2005

Lawrence's Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions

Paul M. Secunda
Marquette University Law School, paul.secunda@marquette.edu

Publication Information
Paul M. Secunda, Lawrence's Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions, 50 Vill. L. Rev. 117 (2005)

LAWRENCE'S QUINTESSENTIAL MILLIAN MOMENT AND ITS IMPACT ON THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

PAUL M. SECUNDA*

TABLE OF CONTENTS

* Assistant Professor of Law, University of Mississippi School of Law. I would like to thank George Cochran, Arnold Loewy, Mike Seidman, Bill Araiza, Jack Nowlin, Paul Salamanca Eugene Kontorovich, John Pottow and Jim Oleske for instructive conversations and their helpful comments and insights on earlier drafts of this article. David Splaingard, Ole Miss Law School Class of 2005, provided valuable research assistance for this article. Of course, any errors are mine alone. A version of this article was presented at the Young Scholars Workshop at the Southeastern Association of Law Schools Annual Conference in Kiawah Island, South Carolina on August 1, 2004. The research and writing of this article was funded by a Lamar Order Grant from the University of Mississippi School of Law.

> To talk of universal, natural, or human rights is to connect respect for human life and integrity with the notion of autonomy . . . . With the development of the post-Romantic notion of individual difference, this expands to the demand that we give people the freedom to develop their personality in their own way, however repugnant to ourselves and even to our moral sense . . . .
>
> Charles Taylor[1]

I. INTRODUCTION

AN unforeseen Millian[2] moment recently occurred at the United States Supreme Court, initiated by one of the Supreme Court's conservative members in the dramatic and singular case of *Lawrence v. Texas*.[3] While many commentators have looked on with puzzlement, dismay and wonder at Justice Kennedy's cryptic opinion for the majority,[4] this article reads *Lawrence* as embracing a Millian notion of personal autonomy, grounded

1. CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 12 (1989).

2. "Millian" refers to the philosophical thought of the eminent nineteenth-century utilitarian philosopher, John Stuart Mill. His moral philosophy is grounded on the belief that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others." *See generally* JOHN STUART MILL, ON LIBERTY 11 (David Spitz ed., W.W. Norton & Co. 1975) (advocating that individual liberties may only be interfered with in context of protection).

3. 539 U.S. 558 (2003).

4. *See, e.g.*, Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1141 (2004) (questioning individual liberties actually granted in *Lawrence*); Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1399–400 (2004) (questioning *Lawrence*'s impact "as a matter of freedom, as a matter of rights, as a matter of sexual politics"); Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1103–04 (2004) (describing difficulties in understanding *Lawrence* opinion); Laurence H. Tribe, Lawrence v. Texas*: The Fundamental Right That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004) (questioning future impact of *Lawrence*); Martin A. Schwartz, *Constitutional Basis of* 'Lawrence v. Texas,' N.Y. L.J., Oct. 14, 2003, at 3 (stating that *Lawrence* decision is "virtually certain [to] spark numerous constitutional challenges to other governmental policies that disadvantage homosexuals").

in the liberty-affirming exhortation that "[o]ver himself, over his own body and mind, the individual is sovereign."[5]

Of course, it is all well and good to speak in the often ethereal language of moral philosophy. In more practical terms, the Supreme Court appears to have achieved this jurisprudential recalibration by countenancing an original approach to substantive due process, which has three important dimensions.[6] First, *Lawrence* makes a subtle, innovative move by formally recognizing the overlapping nature of equal protection and substantive due process.[7] Second, and based on this recognition, *Lawrence* imports from equal protection analysis into the substantive due process context a more searching form of rational basis review (sometimes called "rational review with bite") to comparatively analyze the importance of the individual's personal and private relationships with the state's purported

5. MILL, *supra* note 2, at 11 (arguing that society should not restrict individual liberties where those liberties concern individual alone); *see also* William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1083 & n.210 (2004) (observing that *Lawrence* may be read to establish strong libertarian baseline for state regulation of sexual activities, as "[s]ome of the language of Justice Kennedy's opinion has a whiff of Mill"); Hunter, *supra* note 4, at 1105 (recognizing that *Lawrence* can be read as libertarian anthem); Tribe, *supra* note 4, at 1938 (observing that although Justice Holmes famously complained about Supreme Court enacting "Mr. Herbert Spencer's Social Statics" in *Lochner v. New York*, 198 U.S. 45, 75 (1905), he did not proclaim that Constitution failed to enact John Stuart Mill's *On Liberty*, because saying that would have been inconsistent with reading Constitution as charter of pure liberal individualism); *cf.* Julie M. Spanbauer, Kimel *and* Garrett*: Another Example of Court Undervaluing Individual Sovereignty and Settled Expectations*, 76 TEMP. L. REV. 787, 820 (2003) ("A very basic consideration and beginning point of constitutional analysis is its recognition of individual rights, rendering the individual sovereign over certain spheres of life, while simultaneously granting powers to the states."). *But see* Franke, *supra* note 4, at 1400–01 (arguing that *Lawrence* relies on narrow version of liberty that is both "geographized and domesticated"); Miranda Oshige McGowan, *From Outlaws to Ingroup:* Romer, Lawrence, *and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1315–32 (2004) (arguing that *Lawrence* is not Millian in orientation); Louis Michael Seidman, *Out of Bounds*, 64 OHIO ST. L.J. (forthcoming) (unpublished manuscript, on file with author) ("Reading the harm principle into the Constitution elevates a particular and contestable moral theory over its many plausible rivals . . . . In effect, it establishes an official morality in the teeth of *Lawrence*'s Court's own claim that the government has no business enshrining official moral principles.").

6. Other commentators have also recognized that *Lawrence* represents a new approach to substantive due process. *See* Robert C. Post, *The Supreme Court 2002 Term, Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 97 (2003) ("Themes of respect and stigma are at the moral center of the *Lawrence* opinion, and they are entirely new to substantive due process doctrine."); Tribe, *supra* note 4, at 1899 ("*Lawrence* significantly altered the historical trajectory of substantive due process and thus of liberty.").

7. For a further discussion of the redefined relationship between equal protection and substantive due process, see *infra* notes 38–46 and accompanying text; *see also* Tribe, *supra* note 4, at 1945 (arguing that equal liberty recognized by *Lawrence* is 'outgrowth of the combination of due process and equal protection that drove the Court's decision").

interests.[8] Under this approach, the Court is able to give substantial weight to an individual's liberty interests in forming and maintaining private intimate associations.[9] Third, rather than applying traditional labels to individual rights, such as "fundamental interests" and "liberty interests," the Court softens the hard edges of the normal tiered approach and engages in a more informal constitutional balancing of the relevant state and individual interests to determine which interests should prevail.[10]

Applying this new form of substantive due process doctrine to the facts of *Lawrence*, the Supreme Court determined that the majority's mere moral disapproval of the private practice of consensual homosexual sodomy would no longer suffice as a valid state justification for intruding upon an individual's rights to privacy and intimate association.[11] In balancing the relevant state and individual interests in *Lawrence*, the Court decided that the articulated state interests were not substantial enough to outweigh the important interests of individuals in exercising their individual autonomy.[12] Because the Court found that the constitutional balance in this context favored the individual, it upheld the legality of such individ-

---

8. For a further discussion of the standard of review used by the Court in *Lawrence*, see *infra* notes 47–89 and accompanying text.

9. For a further discussion of the Court's analysis of individual autonomy, see *infra* notes 47–89 and accompanying text.

10. For a further discussion of the Court's balancing of state and individual interests in *Lawrence*, see *infra* notes 90–100 and accompanying text.

11. *See* Lawrence v. Texas, 539 U.S. 558, 577 (2003) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . .") (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))); *see also Bowers*, 478 U.S. at 201 (Blackmun, J., dissenting) (describing Hardwick's claim as centering on "his privacy and his right of intimate association"). Similar to Justice Blackmun, I believe that the right to personal autonomy consists of two separate, already recognized liberty interests, both of which are grounded in the substantive component of the Due Process Clause of the Fourteenth Amendment: (1) the right to privacy found in such cases as *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Roe v. Wade*, 410 U.S. 113 (1973), and (2) the right to intimate association found in the case of *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). *Accord* Edward Stein, *Introducing* Lawrence v. Texas*: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN'S L.J. 263, 288 (2004) ("In overturning *Bowers*, *Lawrence* displace[d] *Bowers*' narrow view of the right to privacy, arguably broadening it into a right to intimate association . . . .").

12. For a further discussion of the *Lawrence* Court's recognition and description of the right to private intimate association, see *infra* notes 90–100 and accompanying text. Professor Sunstein has talked about a balancing approach to rational review with bite cases in the equal protection context. *See* Cass R. Sunstein, *The Supreme Court 1995 Term, Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 77 (1996) (stating that "there has been at least a modest convergence away from tiers toward general balancing of relevant interests"). This article argues that *Lawrence* implicitly applies the same heightened rational basis review in the substantive due process context. For a further discussion on the standard of review utilized by the Court in *Lawrence* when examining substantive due process issues, see *infra* notes 47–89 and accompanying text.

ual practices, even though such behavior was morally repugnant to the majority in Texas.[13]

To consider what practical impact *Lawrence*'s Millian moment might have on state regulation of personal relationships in other forums, this article selects a highly controversial area of public employment law within the higher education context. In seeking to regulate consensual relationships between faculty and students, public universities[14] are increasingly passing consensual relationship policies that prohibit some, or all, faculty-student relationships.[15] Such heavy-handed state regulation collides head-

13. *See Lawrence*, 539 U.S. at 578–79 (holding that private homosexual conduct was not crime). The *Lawrence* Court's finding in this regard was consistent with Mill's basic civil libertarian philosophy espoused in *On Liberty*:

> [T]he principle [of human liberty] requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to the consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.

MILL, *supra* note 2, at 13; *see also* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1305 (2004) (arguing that government should only "adopt[ ] laws and policies that can be justified by reference to observable or otherwise demonstrable harms").

14. "Public university" and "university" are used interchangeably in this article, as the primary focus is on the validity of university state action that interferes with the personal autonomy of its professors. Generally, the requisite state action for constitutional purposes is considered lacking when private university or college conduct is in question. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 841–43 (1982) (holding that discharge of private school teachers was not state action and that private school was not subject to constraints of federal Constitution). Of course, Supreme Court case law in the state action area is not so clear-cut. For a more comprehensive examination of the issues surrounding the state action doctrine, see Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 329–60 (1993) (exploring issues surrounding state-action doctrine).

15. *See generally* Neal Hutchens, *The Legal Effect of College and University Policies Prohibiting Romantic Relationships Between Students and Professors*, 32 J.L. & EDUC. 411, 411–43 (2003) (commenting on implementation and effects of consensual faculty-student relationship policies at higher education institutions). Several public universities have such conflict of interest faculty-student consensual relationship policies. *See generally* MONTANA STATE UNIVERSITY-NORTHERN, *Administrative Policy and Procedures Manual, § 1001.12 Consensual Relationships*, *available at* http://www.nmclites.edu/admin/policies/1001-12.htm (last visited Oct. 25, 2004) (stating that "[t]he University takes the position that amorous relationships between faculty members and students . . . are a basic violation of professional ethics, regardless of the appearance of mutual consent"); UNIVERSITY OF ALABAMA AT BIRMINGHAM, *Policy Concerning Consensual Romantic Relationships*, *available at* http://www.iss.uab.edu/Pol/ConsensualCtab.pdf (last visited Oct. 25, 2004) (stating that no "consensual romantic or sexual relationships" may exist between parties where one party "supervises, evaluates, or grades the other party"); UNIVERSITY OF CALIFORNIA OFFICE OF THE PRESIDENT, *University of California Policy on Conflicts* of Interest Created By Consensual Relationships, *available at* http://www.universityofcalifornia.edu/regents/regmeet/mar04/504attach.pdf (last visited Oct. 25, 2004) (illustrating conflict of interest that develops with existence of consensual faculty-student relationships and steps required of individuals to eliminate that conflict); UNIVERSITY OF IOWA OFFICE OF EQUAL OPPORTUNITY & DIVERSITY, *Policy on Consen-*

on with individual faculty members' rights to privacy and intimate association.

Elsewhere, and mostly from a policy point of view, I have argued for a sliding scale approach to faculty-student consensual relationship policies.[16] Under this approach, supervisory faculty-student relationships are presumptively prohibited, while nonsupervisory relationships are presumptively permitted; the key being that neither presumption absolutely bans any such relationship.[17] This approach is based on the premise that respect for personal autonomy should not mean that society reflexively kow-tows to every quirky predilection a professor has in becoming romantically involved with his or her students; nevertheless, it should mean that an individual's rights to privacy and intimate association are taken seriously and weighed in a balance of relevant interests before the professor's rights are infringed upon by the state. I believe the legal orientation of the sliding scale approach is consistent with the Millian approach taken by the *Lawrence* Court's newfound respect for individual autonomy.

Although at least one commentator has argued that specific language in the *Lawrence* decision makes its applicability to faculty-student consensual relationship policies dubious,[18] closer scrutiny of the Court's language establishes that *Lawrence*, far from exempting student-faculty consensual relationships, should reinvigorate faculty members' rights to

---

sual Relationships Involving Students, available at http://www.uiowa.edu/~eod/policies/pol-on-consensual/pol-consensual-full.html#52 (last visited Oct. 25, 2004) (listing policies for consensual relationships involving faculty and students); UNIVERSITY OF NEVADA AT RENO, *University Policy on Consensual Sexual Relationships, available at* http://www.unr.edu/sapd/documents/UNIVERSITYPOLICYONCONSENSUALSEXUALRELATIONSHIPS_000.pdf (last visited Oct. 25, 2004) (barring "romantic or sexual relationships only in circumstances in which one of the individuals is in a position of direct professional power over the other"); UNIVERSITY OF TEXAS AT ARLINGTON, *Fiscal Regulations and Procedures: Equal Opportunity and Affirmative Action: Sexual Harassment, Sexual Misconduct and Consensual Relationships, available at* http://www3.uta.edu/policy/fisregs/eoaa/3A-1.htm (last visited July 8, 2004) (prohibiting consensual relationships between faculty and students "they currently teach, supervise or advise"); WEST VIRGINIA UNIVERSITY, *Sexual Harassment Policy: Policy and Procedure Regarding Sexual Harassment, available at* http://www.wvu.edu/~socjust/sexual.htm (last visited Oct. 25, 2004) ("It is a University policy violation for a faculty member to engage in an amorous, dating, or sexual relationship with a student whom the faculty member instructs, evaluates, supervises, or advises.").

16. *See* Paul M. Secunda, *Getting to the Nexus of the Matter: A Sliding Scale Approach to Faculty-Student Consensual Relationship Policies in Higher Education*, 55 SYRACUSE L. REV. 55, 80–84 (2004) (discussing deficiencies of other approaches to faculty-student consensual relationships).

17. *See id.* at 81 (explaining that, under sliding scale faculty-student consensual relationship policy, consensual relationship's permissibility is based "on the discernible impact or effect . . . [it will have on:] the college's or university's reputation in the community, . . . the ability of the professor to effectively perform his or her job, . . . [or] the desire of other third-party students or faculty members to interact with the professor in question").

18. *See* Hutchens, *supra* note 15, at 426 ("In sum, the extent to which *Lawrence* limits consensual relationship policies at public universities and colleges remains somewhat doubtful.").

privacy and intimate association in the public university context.[19] Moreover, a thorough consideration of the Court's unconstitutional conditions doctrine leads to the conclusion that a balancing of state and individual interests is the proper way to proceed when the state acts as an employer in the public employment context.[20] And under the constitutional balancing approach embraced by the Court in *Lawrence*, faculty-student consensual relationship policies that ban some or all supervisory relationships in the public university context should be considered unconstitutionally overbroad;[21] the policies create an undue burden on the exercise of a faculty member's rights to privacy and intimate association.[22]

Nevertheless, some, including Justice Scalia, have argued that such a broad notion of individual autonomy will inevitably cause us all to fall down a slippery slope that will lead to a necessary acceptance of incest, prostitution and adultery.[23] But far from signaling the end to all morals legislation, as Justice Scalia prophesized in his *Lawrence* dissent,[24] the Court appears to have merely embraced a robust notion of personal autonomy while still permitting a distinction to be drawn between consensual, private, non-harmful conduct on the one hand, and nonconsensual,

19. For a further discussion on why the *Lawrence* decision does not exempt university regulation of student-faculty consensual relationships, see *infra* notes 136–69 and accompanying text.

20. For a further discussion of how the holding in *Lawrence* applies to the faculty-student consensual relationship context, see *infra* notes 170–89 and accompanying text.

21. The Supreme Court has stated in the criminal context that the overbreadth doctrine has no vitality outside of the First Amendment. *See* Schall v. Martin, 467 U.S. 253, 269 n.18 (1984) ("[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad."). However, Professors Decker and Dorf have separately and persuasively argued that the overbreadth doctrine should not be so constrained. *See* John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. REV. 53, 55 & n.11 (2004) (stating that "there is no legitimate reason to limit the use of overbreadth to the First Amendment and . . . courts should rely on the overbreadth doctrine to protect other fundamental rights"); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 264–65, 269 (1994) ("[S]trong theoretical and practical reasons . . . justify extending the overbreadth doctrine beyond the First Amendment.").

22. For a further discussion on the unconstitutionality of overbroad public university policies that seek to ban some or all faculty-student consensual relationships, see *infra* notes 190–202 and accompanying text.

23. *See* Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (arguing that no rational basis exists to broaden personal autonomy protections to "matters pertaining to sex"); *see also* Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1240 (11th Cir. 2004) (using slippery slope logic to uphold Alabama statute forbidding commercial distribution of sexual devices), *reh'g and reh'g en banc denied*, No. 02-16135DD (11th Cir. Sept. 24, 2004), *petition for cert. filed*, (U.S. Dec. 17, 2004) (No. 04-849). For an excellent and comprehensive discussion of these constitutional boundary issues, see Seidman, *supra* note 5.

24. *See Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of *Bowers*' validation of laws based on moral choices . . . . Every single one of these laws is called into question by today's decision . . . .").

public, harmful conduct on the other.[25] *Lawrence*, and its Millian conception of liberty, teaches that individuals should be free from government sanction so long as the conduct does not cause harm to the interests of relevant third-parties,[26] certainly not a radical notion, which should keep the Rick Santorums of the world from predicting a moral apocalypse.[27] At the end of the day, we are all enriched by a judicial orientation that promotes rather than destroys individual liberty.

This article describes the characteristics and ramifications of this Millian moment in six parts. Part II discusses the *Lawrence* decision in detail, highlighting its treatment of the relationship between equal protection and substantive due process, its implicit adoption of heightened rational basis review and its use of a constitutional balancing approach to give weight to the substantial individual liberty interests of privacy and intimate association at stake in these types of cases. Turning to the impact of *Law-*

25. *See* Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy After* Lawrence v. Texas, 16 YALE J.L. & FEMINISM 1, 38 (2004) ("The decision in *Lawrence* reached the correct conclusion in granting constitutional protection to adult sexual privacy where consensual, non-public, and no harm to third parties is involved."); *see also* Carpenter, *supra* note 4, at 1153 (advancing argument that right recognized in *Lawrence* is "of adults to engage in a noncommercial, consensual, sexual relationship in private, where their activity involves no injury to a person or harm to an institution (like marriage) the law protects").

26. This is the so-called "harm principle." *See* Eskridge, *supra* note 5, at 1083 (describing basics of Mill's harm principle). Many of Justice Scalia's parade of horribles would continue to be criminally proscribed under this principle because such conduct causes demonstrable harm to third parties or to the larger community. *See id.* at 1089 (explaining that majority of conduct on Justice Scalia's list falls within boundaries of permissible state regulation); Hunter, *supra* note 4, at 1112 (explaining that conduct like that found in Scalia's parade of horribles may still be regulated if states demonstrate conduct's objectively harmful effects). For instance, adultery "violates a promise of fidelity and often imposes reliance and other costs on the innocent spouse," and public prostitution "remains universally regulated and is associated with nuisances of various sorts." Eskridge, *supra* note 5, at 1089 (listing several of Scalia's listed acts and explaining their harmful societal effects); *see also* Carpenter, *supra* note 4, at 1154 (observing that *Lawrence* does not affect laws against prostitution because it involves personal, non-commercial relationships); Stein, *supra* note 11, at 281 (suggesting that incest leads to harm of younger family members within family dynamic, forcing continued state regulation). On the other hand, intimate relationships between homosexuals or between faculty and students may only cause indirect harms in some circumstances, and as argued in detail below, should only be regulated if substantial direct harms are likely to occur to others. *See* C. L. Ten, *Mill on Self-Regarded Actions* (1969) *in* MILL, *supra* note 2, at 11 (examining distinction between direct and indirect harms in Millian sense). "Self-regarding actions are those actions which, if they affect others, do so only indirectly. This means that they affect others only because they are disliked or found to be immoral or repugnant." *Id.*

27. Republican United States Senator Rick Santorum of Pennsylvania stated in an Associated Press interview that "[i]f the Supreme Court says that you have the right to consensual (gay) sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything." *See* Sean Loughlin, *Santorum Defends Comments On Homosexuality, at* http://www.cnn.com/2003/ALLPOLITICS/04/23/santorum.gays/index.html (Apr. 23, 2003).

rence on future state regulation of personal relationships outside of the criminal context, Part III catalogs the various types of faculty-student consensual relationship policies that public universities have enacted in recent years. Part IV contends that the language in *Lawrence* does not exempt these faculty-student consensual relationship policies in the public university context, that the doctrine of unconstitutional conditions in the public employment context makes the balancing of state and individual interests the only proper approach and that the requirement of this balancing approach in these types of cases makes public university policies that ban some or all consensual relationships between faculty and students unconstitutionally overbroad. Part V concludes the analysis by reexamining the sliding scale approach to faculty-student consensual relationships advanced elsewhere and by contending that such an approach is the only appropriate one from both a policy and a constitutional perspective.

II. *LAWRENCE V. TEXAS*: REINVIGORATING SUBSTANTIVE DUE PROCESS

The facts of *Lawrence* are straightforward, but, as will be illustrated shortly, that is all that is clear-cut about this enigmatic opinion.[28] In *Lawrence*, two men engaging in consensual anal sex in a private residence were arrested under the Texas sodomy statute[29] when police entered their apartment based on a report of a weapons disturbance.[30] After being held in jail overnight, the men were charged and convicted of violating the statute and forced to pay a fine.[31] Thereafter, they challenged the validity of the sodomy statute on equal protection and due process grounds under the Fourteenth Amendment of the United States Constitution[32] in Texas state court and eventually in the United States Supreme Court.[33]

In invalidating the sodomy statute, the Supreme Court took a significant step in reaffirming the centrality of civil liberties in American jurisprudence by recognizing the right of consenting adults to engage in private intimate conduct under the substantive component of the Due Process Clause of the Fourteenth Amendment.[34] Although *Lawrence* con-

28. *See* Hunter, *supra* note 4, at 1103 (noting that *Lawrence* is easy to read, but hard to pin down).

29. *See* TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.").

30. Lawrence v. Texas, 539 U.S. 558, 562 (2003) (discussing facts of case).

31. *See id.* at 563 (same). For their crimes, the men were each fined $200 and assessed court costs of $141.25. *See id.* (same).

32. *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

33. *See Lawrence*, 539 U.S. at 563 (listing procedural history of case).

34. *See id.* at 560 (stating that this case "involve[d] two adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle . . . [and that their] right to liberty under the Due Process Clause g[a]ve[ ]

cerned a criminal sodomy statute, most commentators have rightly understood the breadth of the Court's holding to extend beyond the facts of the case.[35] Indeed, *Lawrence* announces a broad new principle, establishing a greater respect than previously existed for the rights of privacy[36] and intimate association.[37] The Court accomplishes this doctrinal feat by introducing a new, innovative form of substantive due process, having three distinct dimensions. It is to these three dimensions that this article now turns.

A. *Redefining the Relationship Between Substantive Due Process and Equal Protection*

The first dimension of *Lawrence*'s new substantive due process approach concerns a subtle, innovative realignment of the relationship between substantive due process and equal protection under the Fourteenth Amendment.[38] Although *Lawrence* by no means represents the first time the Supreme Court or legal scholars have recognized the close relation-

---

them the full right to engage in [that] private conduct without government intervention").

35. *See* Schwartz, *supra* note 4 (arguing that it is "virtually certain that *Lawrence* will spark numerous constitutional challenges to other government policies" in areas as diverse as same-sex marriage, public employment and military's "don't ask, don't tell" policy); Tribe, *supra* note 4, at 1899–1900 ("The central contribution of *Lawrence* . . . does not arise from the questions the Supreme Court answered . . . . Rather, the core contribution . . . comes from the manner in which the Court framed the question of how best to provide content to substantive due process rights.").

36. Although there is no express mention of privacy in the United States Constitution, there is a long-recognized tradition for the state to leave its citizens alone in the context of personal relationships and in the privacy of their own bedrooms. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness . . . . They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."), *overruled by* Katz v. United States, 389 U.S. 347 (1967). More recently, the Supreme Court has begun to recognize specific privacy rights granted to individuals through the text of the Constitution itself. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (explaining that within penumbras and emanations of Bill of Rights, certain levels of privacy are guaranteed); *see also* Roe v. Wade, 410 U.S. 113, 153 (1973) (noting that right to privacy exists in substantive aspects of liberty interest described in Due Process Clause of Fourteenth Amendment); *Griswold*, 381 U.S. at 486–87 (Goldberg, J., concurring) (stating that right of marital privacy is supported by "the language and history of the Ninth Amendment" and its reservation of certain fundamental rights to people). *See generally* Stein, *supra* note 11, at 263–66 (surveying development of right to privacy under United States Constitution). *But see Lawrence*, 539 U.S. at 605–06 (Thomas, J., dissenting) (arguing that there is no general right to privacy in United States Constitution).

37. The right to intimate association was expressly recognized in 1984. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) (recognizing that "certain kinds of highly personal relationships" should be afforded "a substantial measure of sanctuary from unjustified interference by the State").

38. *See* Hunter, *supra* note 4, at 1134 (observing developing understanding of interdependence of liberty and equality, which can be traced back to Court's abor-

ship between these two provisions,[39] it is the first time that the Supreme Court has formally described in detail how the two clauses interact in cases concerning state interference with a personal and private relationship.[40] In this vein, the *Lawrence* Court explained that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[41]

In other words, the Court maintains that a decision on substantive due process grounds will necessarily have beneficial equality consequences, at least when personal relationships are involved.[42] Although the converse is not always true, an equality-affirming decision may also have some beneficial consequences for an individual's liberty interests.[43] Thus, the Court appears to recognize that both the complementary con-

---

tion cases); Tribe, *supra* note 4, at 1934 (arguing that link between substantive due process and equal protection in *Lawrence* is important doctrinal innovation).

39. *Compare* M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) (observing that "[d]ue process and equal protection principles converge" in cases concerning parent-child relationships) (quoting Bearden v. Georgia, 461 U.S. 660, 665 (1983))), *with* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (stating that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive"). These holdings are consistent with the views of a number of legal scholars, which find the two clauses complementary, not interchangeable. *See, e.g.*, Ira Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 982–85 (1979) (depicting inaccurate blending of equal protection and due process doctrines).

40. Other courts have recently described this same interconnectedness of substantive due process and equal protection. In a landmark decision, the Supreme Judicial Court of Massachusetts found that "[i]n matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts frequently overlap, as they do here." *See* Goodridge v. Dep't of Pub. Health, 798 N.E. 2d. 941, 969 (Mass. 2003) (finding right to same-sex marriage under Massachusetts state constitution); *see also* Perez v. Lippold, 198 P.2d 17, 18–19 (Cal. 1948) (analyzing statutory ban on interracial marriage as equal protection violation concerning regulation of fundamental right).

41. *Lawrence*, 539 U.S. at 575 (detailing ways that equal protection and due process commingle in context of homosexual discrimination). Additionally, the confluence of equal protection and substantive due process analysis in the personal relationship context makes sense given that rights considered fundamental in the equal protection context are similar to those considered fundamental in the substantive due process context. *See* Zablocki v. Redhail, 434 U.S. 374, 390–91 (1978) (right to marry); Roe v. Wade, 410 U.S. 113, 164–67 (1973) (right to have abortion); Skinner v. Oklahoma, 316 U.S. 535, 543 (1942) (right to procreate); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) (plurality opinion) (preventing city of Cleveland from standardizing definition of "family" under substantive Due Process Clause).

42. *See* Tribe, *supra* note 4, at 1898 (arguing that, far from having separate missions and entailing different inquiries, equal protection and substantive due process "are profoundly interlocked in a legal double helix").

43. For example, when African-American citizens' equal right to vote in American elections was diluted by certain state actions and such actions were found to be unconstitutional, the consequence of this equality-affirming decision of the Supreme Court was also an increased respect for African-American dignity and autonomy. *See* Gomillion v. Lightfoot, 364 U.S. 339, 348 (1960) (analyzing

cepts of equality and liberty embrace a robust notion of individual autonomy and human dignity.[44] And because of the nature of this "interlock[ing] . . . legal double helix,"[45] this article contends that much of the analysis undertaken in the equal protection context has been implicitly adopted by the Supreme Court in the substantive due process context.[46]

B. *Reading* Lawrence*'s Tea Leaves for a Standard of Review*

Having established the interconnected dynamic between equal protection and substantive due process, the second dimension of the *Lawrence* Court's substantive due process analysis involves how these two strands of the Fourteenth Amendment act in tandem to protect individual autonomy from unwarranted state interference. This exercise in divining the proper judicial standard of review from the *Lawrence* majority is rendered difficult by the exceedingly enigmatic nature of the opinion.[47]

Although Justice Kennedy's majority opinion finds the Texas sodomy statute unconstitutional, the manner in which Justice Kennedy arrives at this conclusion is both cryptic and labyrinthine. With regard to the cryptic nature of the opinion, it can be argued that the Court, consistent with prior substantive due process jurisprudence and principles of *stare decisis*, should have decisively, in accordance with *Washington v. Glucksberg*,[48] determined whether a fundamental liberty interest existed in *Lawrence*.[49]

---

state attempt at gerrymandering used to deprive African-Americans of right to vote).

44. *Accord* Hunter, *supra* note 4, at 1103 (commenting on *Lawrence*'s great impact on both human equality and dignity); *see also* Tribe, *supra* note 4, at 1898 ("The 'liberty' of which the [*Lawrence*] Court spoke was as much about equal dignity and respect as it was about freedom of action . . . .").

45. Tribe, *supra* note 4, at 1898 (describing relationship between substantive due process and equal protection within *Lawrence*).

46. *See id.* ("[The narrative of substantive due process] is a single, unfolding tale of equal liberty and increasingly universal dignity."); *see also id.* ("*Lawrence* . . . both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty. The 'liberty' of which the Court spoke was as much about equal dignity and respect as it was about freedom of action—more so, in fact.").

47. This author is certainly not alone in having trouble divining *Lawrence*'s meaning. *See* Hunter, *supra* note 4, at 1139 (observing that *Lawrence* leaves "enormous flexibility as to how broadly or narrowly future courts will interpret it," and that, "the most significant point to bear in mind is that the function of lower federal courts, scholars, and practitioners now will be not so much to find the meaning of *Lawrence* as to create it."); *see also* Carpenter, *supra* note 4, at 1149 (observing that *Lawrence* opinion is so opaque that it bears great many interpretations).

48. 521 U.S. 702 (1997).

49. *See* Carpenter, *supra* note 4, at 1140 (describing pre-*Lawrence* world as bifurcated into large domain of unprotected "liberty interests" and very small domain of strongly protected "fundamental rights"). *But see* Tribe, *supra* note 4, at 1898 (maintaining that "[*Lawrence*] Court gave short shrift to the notion that it was under some obligation to confine its implementation of substantive due process to the largely mechanical exercise of isolating 'fundamental rights' as though they

Such a determination was crucial because this initial characterization was tantamount to how the case would be decided[50]—rational basis review was equivalent to substantial deference to the state's judgment, while strict scrutiny review usually led to a finding of unconstitutionality.[51] Consequently, if the Court had decided that a fundamental liberty interest was at stake in *Lawrence*, the Texas sodomy law would have been subject to strict scrutiny, and, under such a test, likely struck down as not narrowly tailored to further a compelling government interest.[52] On the other hand, if no

---

were a historically given set of data points on a two dimensional grid . . . ."). Unlike Professor Tribe, I do not believe that Justice Kennedy intentionally gave "short shrift" to traditional notions of substantive due process, but rather that he agreed to join the majority only because he was not required to recognize the rights identified in *Lawrence* as traditional "fundamental rights." This understanding of Justice Kennedy's opinion in *Lawrence*, although speculative, makes the most sense if one considers the lengths to which he went to exclude homosexual marriage from the Court's holding. *But see* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 953 (Mass. 2003) (citing *Lawrence* for support in finding right to same-sex marriage under Massachusetts Constitution).

50. *See* Schwartz, *supra* note 4, at 6 (citing comments by Professor Erwin Chemerinsky of Duke University that standard of judicial review is critical and very frequently determinative when challenging governmental policy under substantive due process).

51. *See id.* ("When the Court employs low-level review it affords substantial deference to the legislative judgment," while conversely, "high-level review typically entails a virtual presumption of unconstitutionality."); *see also Glucksberg*, 521 U.S. at 720–21 (noting important distinction between substantive due process analysis based on fundamental right versus non-fundamental right).

52. Under *Glucksberg*, there is a two-step analytical framework that the Court applies when evaluating a claim of new fundamental rights. *See* Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1240 (11th Cir. 2004) (providing brief discussion of *Glucksberg* "fundamental right" test), *reh'g and reh'g en banc denied*, No. 02-16135DD (11th Cir. Sept. 24, 2004), *petition for cert. filed*, (U.S. Dec. 17, 2004) (No. 04-849). First, there must be a careful description of the asserted right. *See id.* Second, a court must determine whether this asserted right "is one of 'those fundamental rights and liberties which are, objectively, deeply rooted in the Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" *See id.* (quoting *Glucksberg*, 521 U.S. at 720–21); *see also* Lofton v. Sec'y of the Dept. of Children and Family Servs., 358 F.3d 804, 815 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3247 (U.S. Jan. 10, 2005) (No. 04-478) (concluding that, through *Glucksberg* test, same-sex foster parents do not have constitutional protections given to natural adoptive parents). This analysis has been correctly criticized as crushing the substantive due process privacy doctrine by "requiring a historical pedigree so pure as to guarantee that majoritarian rule had to have generally protected the right in all but a few outlier states." *See* Herald, *supra* note 25, at 8 (listing strategies employed by Justices in crushing substantive due process doctrine); *see also* Tribe, *supra* note 4, at 1934 (noting "foolishness of attempting to define the dimensions of human liberty that give rise to elevated scrutiny by enumerating a catalog of private actions that might (or might not) fall on the protected side of the constitutional line").

fundamental interest was found, the Texas sodomy law would have likely been upheld as rationally related to a legitimate government interest.[53]

To say that *Lawrence* is less than clear on which standard of judicial review it applied is the height of understatement.[54] From the first days of its issuance, commentators have disagreed over whether *Lawrence* recognized a sacrosanct fundamental right to private sexual intimacy or merely identified a liberty interest that could normally, but not in this case, be burdened by some legitimate state interest.[55] This controversy derives from the labyrinthine nature of the opinion itself.

On the one hand, from the first lines of the opinion to almost its end, Justice Kennedy employs expressive and sweeping language to declare that "the State is not omnipresent in the home," and that "[f]reedom extends beyond spatial bounds," and finally "[t]he instant case involves liberty of the person both in its spatial and transcendent dimensions."[56] Such grandiloquent language[57] would seem to suggest that the liberty interest involved is indeed a fundamental one.[58] On this theory, because the Texas

53. *See Glucksberg*, 521 U.S. at 722 (requiring identification of fundamental right concurrent with traditional notions of liberty before allowing petitioner constitutional standing for "liberty interest" claim).

54. *See* Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting) (criticizing majority decision in *Lawrence* for lack of clarity with regard to applied standard of review).

55. *Compare* Herald, *supra* note 25, at 29–32 (arguing that *Lawrence* "is an elegant discourse on individual autonomy and liberty," and that some form of heightened review is involved), *and* Hunter, *supra* note 4, at 1104 (reading *Lawrence* to extend meaningful constitutional protection to liberty interests without denominating them fundamental rights), *and* Schwartz, *supra* note 4, at 6 (concluding that *Lawrence* Court relied on "important low-level scrutiny"), *and id.* (describing Professor Dorf's argument that Justice Kennedy's reliance on decisions like *Griswold* and *Roe* may imply that Court intended some form of heightened scrutiny), *and* Tribe, *supra* note 4, at 1899 (arguing that Court in *Lawrence* "implicitly reject[ed] the notion that its task was simply to name the specific activities textually or historically treated as protected," and treats doctrine of substantive due process as reflecting "deeper pattern involving the allocation of decision-making roles"), *with Williams*, 378 F.3d at 1250 (Barkett, J., dissenting) (arguing that *Lawrence* denominated fundamental right to sexual privacy), *and* Carpenter, *supra* note 4, at 1155 (interpreting *Lawrence* to hold that right to private, intimate association is fundamental right).

56. *Lawrence*, 539 U.S. at 562 (describing broadly liberty interest Court is protecting). *But see* State v. Limon, 83 P.3d 229, 239 (Kan. Ct. App. 2004) (narrowly construing liberty interests recognized in *Lawrence*),), *review granted*, (May 25, 2004); Franke, *supra* note 4, at 1409 (arguing that "spatial" means private and "transcendent" means relationship-based intimacy).

57. *See* Eskridge, *supra* note 5, at 1024 (observing that *Lawrence*'s soaring rhetoric is found only in handful of Supreme Court decisions); Stein, *supra* note 11, at 273 (noting Justice Kennedy's sweeping and lyrical language in *Lawrence*).

58. *See* Carpenter, *supra* note 4, at 1155 (concluding that right to sexual relations between same-sex partners is fundamental in context of *Lawrence* Court's survey of historical privacy rights in American jurisprudence). Finding that the right to intimate association is a fundamental right would be consistent with the classic exposition of the contours of this right found in Professor Kenneth Karst's *The Freedom of Intimate Association*, 89 YALE L.J. 624, 625 (1980).

anti-sodomy law burdens the exercise of a fundamental right, strict scrutiny mandates that the law be sustained only if it is narrowly tailored to further a compelling government interest.[59]

On the other hand, the latter portion of the opinion concludes with a statement that the Texas sodomy statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[60] This language, though recognizing a liberty interest in one's personal and private life, reflects the use of rational basis review.[61] Under such review, state statutes are presumptively held to be valid if rationally related to a "legitimate" state interest.[62] Regrettably, even as the *Lawrence* Court tells us what is *not* a legitimate state interest by adopting Justice Stevens' *Bowers* dissent,[63] the Court fails to explain *why* a state does not have a legitimate governmental interest in promoting a certain view of morality.[64]

Although the meaning of this schizophrenic decision is far from clear, in this author's view, the best reading of *Lawrence* is that although the liberty interest concerning personal autonomy is a "substantial" or "important" one, it is not a fundamental one.[65] This reading of *Lawrence* is

59. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (outlining method by which state actors may proceed to abrogate fundamental rights through constitutionally acceptable means).

60. *Lawrence*, 539 U.S. at 578.

61. *See id.* (recognizing liberty interest, but still utilizing language normally retained for rational basis review).

62. In this regard, I agree with Justice Scalia that the majority in *Lawrence* is applying a form of rational basis review. *See id.* at 586 (Scalia, J., dissenting) (criticizing majority's overly broad rational basis test as having "far-reaching implications" to other holdings). Nonetheless, I do not agree with Justice Scalia's characterization that this form of rational basis review is an "unheard-of" form of legal analysis. For further critical discussion of the *Lawrence* court's analysis of the rational-basis standard of review, see *infra* notes 65–83 and accompanying text.

63. *See Lawrence*, 539 U.S. at 577–78 (adopting Justice Steven's statement in *Bowers* that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack").

64. *See id.* at 601 (Scalia, J., dissenting) (drawing attention to failure of Justice O'Connor's reasoning to adequately describe how state interests become compromised by morality concerns).

65. *See* Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1240 (11th Cir. 2004) (holding that, in context of use of sexual aids, *Lawrence* did not recognize fundamental right to sexual privacy requiring strict scrutiny analysis), *reh'g and reh'g en banc denied*, No. 02-16135DD (11th Cir. Sept. 24, 2004), *petition for cert. filed*, (U.S. Dec. 17, 2004) (No. 04-849); *see also* Schwartz, *supra* note 4, at 6 (concluding that *Lawrence* court did not find fundamental constitutional right to engage in consensual homosexual sodomy in privacy of one's home). Although I agree with the *Williams* court that *Lawrence* does not recognize a fundamental right to sexual privacy, in coming to its conclusion that an Alabama statute that prohibits the commercial sale of sexual devices is constitutional, the Court failed to give the necessary, heightened review to a state's infringement of an individual's rights to privacy and intimate association required after *Lawrence*. *See Williams*, 378 F.3d at

supported by at least two strong undercurrents in the opinion. First, in discussing the privacy right involved in *Lawrence*, the Court states that "[recent precedent] show[s] an emerging awareness that liberty gives *substantial* protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[66] Moreover, in discussing the liberty interest recognized in *Roe v. Wade*[67] and comparing it to the liberty interest at stake in *Lawrence*, the *Lawrence* Court observes that "[a]lthough the Court held the woman's rights were not absolute, her right to elect an abortion did have real and *substantial* protection as an exercise of her liberty under the Due Process Clause."[68] This repeated use of "substantial" in *Lawrence* supports the conclusion that the Court is applying a standard of judicial review, that, although not involving strict scrutiny, is nevertheless a form of heightened scrutiny, perhaps similar to intermediate scrutiny utilized with state gender classifications.[69]

This view of *Lawrence* is also in accord with Supreme Court precedent in the area of the right to intimate association, in which the Court has recognized that "[a]s a general matter, only [familial] relationships . . . are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty."[70] Although the intimate associations at play in *Lawrence* are not familial interests in the traditional sense, they are akin to "certain kinds of highly personal relationships" that "afford . . . a *substantial* measure of sanctuary from unjustified interference by the State."[71] Again, the use of the word substantial in these cases is telling.

1250 (Barkett, J., dissenting) ("The majority's decision rests on the erroneous foundation that there is no substantive due process right to adult consensual intimacy in the home and erroneously assumes that the promotion of public morality provides a rational basis to criminally burden such intimate activity."). For these reasons, I think *Williams* is wrongly decided and should be overturned on Supreme Court review.

66. *Lawrence*, 539 U.S. at 571 (emphasis added); *see also* Karst, *supra* note 58, at 625 (detailing emergence of Supreme Court jurisprudence based upon right to intimate association between individuals).

67. 410 U.S. 113 (1973).

68. *Lawrence*, 539 U.S. at 565 (emphasis added).

69. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (establishing intermediate scrutiny test under which law containing gender classification is scrutinized to determine whether it substantially furthers any important government interest); *see also* Hunter, *supra* note 4, at 1114 (maintaining that holding in *Lawrence* primarily relies on protection established by previous choice cases, control of one's destiny cases and principle of autonomy cases, such as *Roe* and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)); Schwartz, *supra* note 4, at 6 ("Assuming that the Court in *Lawrence* employed low-level scrutiny, it was important low-level scrutiny.").

70. Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984) (stressing higher than ordinary degree of "attachments and commitments" that may warrant constitutional limitations on state action).

71. *See id.* at 618–19 (emphasis added) (collecting constitutional cases that "reflect[ ] the realization that individuals draw much of their emotional enrichment from close ties with others").

Second, and perhaps more important for establishing a heightened form of judicial review, "rational basis review with bite"[72] in the substantive due process context is similar to that described in Justice O'Connor's *Lawrence* concurrence about equal protection.[73] This recognition is crucial when one considers the interconnectedness of equal protection and substantive due process discussed above.[74] In short, this implicit adoption of the equal protection analysis in the substantive due process context is consistent with the *Lawrence* Court's statements concerning the important linkages between substantive due process and equal protection analysis.[75]

Under this heightened analysis, Justice O'Connor's concurrence acknowledged that the Supreme Court has "been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where . . . the challenged legislation inhibits personal relationships."[76] Although the majority decision in *Lawrence* is far from clear on whether Justice O'Connor's equal protection analysis properly

72. *See* Stein, *supra* note 11, at 269 (citing Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 802–03 (1987)) (discussing standard of review that lies "in between mere rational review and intermediate scrutiny," known as "rational review with bite"). This heightened review has been utilized in recent Supreme Court cases. *See* Romer v. Evans, 517 U.S. 620, 632 (1996) (invalidating Colorado constitutional amendment denying homosexuals ability to be protected by any type of civil rights law); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446–47 (1985) (invalidating state law requiring home for mentally disabled to obtain special use permit while other similarly situated groups, like residents of fraternity houses and apartment buildings, were not so required); Plyler v. Doe, 457 U.S. 202, 230 (1982) (invalidating state law denying undocumented school-age children of alien parents free public school education); Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (invalidating federal law preventing households containing individuals unrelated to any other member of household from receiving food stamps). All four of these cases, however, were decided under the equal protection clause, and not the substantive component of the Due Process Clause. *See Lawrence*, 539 U.S. at 579–80 (O'Connor, J., concurring) (referring to judicial standard of review in these equal protection cases as "more searching form" of rational basis review).

73. The majority in *Lawrence* was unwilling to rest its invalidation of the Texas sodomy statute on equal protection, as that would permit *Bowers* to continue to "demean[ ] the lives of homosexual persons." *See* Schwartz, *supra* note 4, at 3, 6 (discussing Court's use of substantive due process in *Lawrence* to find right to intimate privacy, which mandated the overruling of *Bowers* (quoting *Lawrence*, 539 U.S. at 575)).

74. For a further discussion of the nexus between equal protection and due process under the United States Constitution, see *supra* notes 38–46 and accompanying text.

75. *See* Carpenter, *supra* note 4, at 1151 n.55 (noting that, although *Romer* is equal protection case, there is no reason to believe that holding would not also apply to animus-based denials of liberty under Due Process Clause). *But see* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 511 n.117 (2004) (arguing that "as no other justice joined [Justice O'Connor's] opinion, it is not clear whether a majority of the Court shares her perspective" about heightened rational basis review).

76. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring); *see also* Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in* Grutter *and* Lawrence, 12 WM. & MARY BILL RTS. J. 65, 97 (2003) (arguing that Justice O'Connor's

applies to the majority's substantive due process analysis,[77] it appears the Court implicitly adopted a similar heightened or searching standard of review in the substantive due process context to account for the substantial interest that inheres in the rights to privacy and intimate association.[78] This view of the Court's decision finds doctrinal resonance in the fact that rational basis review and the traditional conception of "legitimate state interests" almost always lead to a state statute being found constitutionally valid. But *Lawrence*, in the tradition of such equal protection cases as *Romer v. Evans*,[79] *Cleburne v. Cleburne Living Center*[80] and even *Craig v. Boren*,[81] applied a rational basis standard of review with "a sharper focus,"[82] and found the Texas sodomy statute invalid. The *Lawrence* Court utilized something more than deferential rational basis review. Their analysis seemingly adopted a form of rational basis review with bite; readily recognizable based on its use in previous Supreme Court equal protection cases.[83]

Thus, a closer reading of Justice Kennedy's majority opinion establishes that the *Lawrence* Court embraced a Millian legal orientation, sup-

---

concurrence signals acceptance of "sliding scale" equal protection standard advocated by Justice Stevens in *Cleburne*).

77. Justice O'Connor avoided this issue by declaring, "[w]hether a sodomy law that is neutral both in effect and application . . . would violate the substantive component of the Due Process Clause is an issue that need not be decided today." *See Lawrence*, 539 U.S. at 584 (O'Connor, J., concurring). Justice Kennedy, for his part, did not explain why the promotion of morality is not a legitimate state interest under a substantive due process analysis, much to the dismay of the dissenting Justice Scalia. *Id.* at 599 (Scalia, J., dissenting) ("This proposition [that there is no rational basis for the law under attack] is so out of accord with our jurisprudence—indeed, with the jurisprudence of *any* society we know—that it requires little discussion."). Be that as it may, Justice Scalia cites only *Bowers* to support his version of what constitutes the Supreme Court's jurisprudence in this area. One would expect at least a substantial string cite of precedent if Justice Scalia's views were so self-evident.

78. *See id.* at 578 ("[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment.").

79. 517 U.S. 620, 632 (1996).

80. 473 U.S. 432, 446–47 (1985).

81. 429 U.S. 190, 197 (1976).

82. *See id.* at 210 n.* (Powell, J., concurring) (expressing need for more clearly defined approach to equal protection analysis in light of Court's difficulty affixing relevant standard to gender-based cases).

83. *See Romer*, 517 U.S. at 632 (stressing equal protection analysis when gay and lesbian population challenged Colorado law barring promulgation of anti-discriminatory laws for homosexuals); *Cleburne*, 473 U.S. at 441 (expressing reluctance of Court to highly scrutinize state motive in passing laws that may affect groups of individuals' rights); Plyler v. Doe, 457 U.S. 202, 230 (1982) (demonstrating that excluding illegal aliens from Texas public school unnecessarily violated equal protection rights of children who were discriminated against by law); Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (reasoning that exclusion of "hippies" in food stamp program violated equal protection jurisprudence).

porting a robust notion of the right to personal autonomy.[84] Implementing this more searching form of rational basis review, Justice Kennedy explained the lack of a legitimate state interest in *Lawrence* by referencing Justice Stevens' dissent in *Bowers v. Hardwick*,[85] a case decided by the Court seventeen years earlier, which upheld the validity of a Georgia sodomy statute prohibiting homosexual intimate relations.[86] There, Justice Stevens wrote, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient reason for upholding a law prohibiting the practice."[87] Thus, because Texas had sought to support its sodomy statute based on the promotion of morality,[88] the *Lawrence* majority struck it down, albeit in somewhat ambigu-

84. *See* Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes . . . certain intimate conduct."). The Court further explained:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

Id. at 574 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 959 (Mass. 2003) (reading *Lawrence* to stand for proposition that, "[w]hether and whom to marry, how to express sexual intimacy, and whether and how to establish a family—these are among the most basic of every individual's liberty and due process rights"). Professor Hunter has advanced the idea that *Lawrence* derives directly from the *American Model Penal Code* and the *British Wolfenden Report*, both documents from the 1950s concerning the criminality of homosexuality, and both drawn from Mill's moral philosophy. *See* Hunter, *supra* note 4, at 1123 (suggesting that underlying principles of criminal theory from 1950s can account for notion of liberty of adults to engage in sexual acts). One may plausibly point out that this Millian revolution was actually started with the above-language of the *Casey* Court in 1992 (which Justices O'Connor, Kennedy, Souter, Stevens and Blackmun joined). But only three justices in *Casey* (Justices O'Connor, Kennedy and Souter) relied on a substantive due process analysis, as an individual's right to autonomy had not yet been located in the substantive component of the Due Process Clause by a majority of the court at that time.

85. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). It may be that Justice Stevens' vote was obtained for the *Lawrence* majority through agreeing to adopt the language of his dissent in *Bowers*. *See* Herald, *supra* note 25, at 29 ("The *Lawrence* opinion reflects a carefully constructed political compromise."). This may explain the incoherent final product produced by the majority.

86. The *Bowers* Court had been unwilling to recognize a fundamental interest in this context and validated the Georgia statute under a traditional rational basis review analysis. *See Bowers*, 478 U.S. at 191 (reasoning that homosexual sodomy is not included as right inherently protected by Constitution because of its failure to be "implicit in the concept of ordered liberty") (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))). Given *Bower*'s reasoning, it is not at all surprising that *Lawrence* expressly overruled it, declaring that "*Bowers* was not correct when it was decided, and it is not correct today . . . . *Bowers v. Hardwick* should be and now is overruled." *Lawrence*, 539 U.S. at 578.

87. *Lawrence*, 539 U.S. at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

88. *See id.* at 582–83 (O'Connor, J., concurring) ("Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis

ous language, as inconsistent with the interests that the two convicted men had in their personal and private lives.[89]

C. *A Constitutional Balancing Act: Describing the Right to Private Intimate Association Recognized by* Lawrence

So how does the Court go about implementing its more searching form of rational basis review in the substantive due process context? It does not follow Justice O'Connor's more mechanistic approach in her concurring opinion. To answer this question, it is necessary to leave behind the rigid world of judicial standards of review encapsulated by such concepts as "rational basis review," "intermediate scrutiny" and "strict scrutiny," and consider an approach that "softens" the "hard edges" of these tripartite tiers.[90] In its place, this article suggests that *Lawrence*, properly conceived, represents an analytical approach recognizing that "there has been at least a modest convergence away from tiers and toward general balancing of relevant interests."[91]

Although this analysis previously has been applied in the field of equal protection, applying this approach in the substantive due process context is consistent with the interdependence of equal protection and substantive due process analyses.[92] Concerning this balancing approach,

review because it furthers the legitimate governmental interest of the promotion of morality.").

89. *See id.* at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

90. *See* Sunstein, *supra* note 12, at 77 (finding that Supreme Court modified traditional equal protection analysis during 1995 term, especially in *Romer*). Some may argue that tiered scrutiny is just a balancing of interests, but by another name. Be that as it may, a balancing of interests connotes a more informal weighing of relevant interests, whereas tiered scrutiny seems overly and unnecessarily rigid, especially where personal and private rights are at stake. In this sense, the balancing of interests discussed here is akin to Justice Marshall's sliding scale approach from *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 125–26 (1973) (Marshall, J., dissenting) (weighing State's interest in enacting financing scheme against interest of private individuals in not being discriminated against within educational system).

91. *See* Sunstein, *supra* note 12, at 77 (concluding that 1995 Supreme Court term significantly modified its original hard-line stance for evaluating what qualifies as equal protection); *see also* Huhn, *supra* note 76, at 104 (maintaining that Justice O'Connor's use of heightened scrutiny in her *Lawrence* concurrence "call[s] into question the stability of the standards of review" that Court traditionally employs); Hunter, *supra* note 4, at 1130–31 (noting that rigid tiered system for equal protection analysis may "collaps[e]"); Stein, *supra* note 11, at 270 n.46 (surveying scholarly theories of standard of review for sexual activity and equal protection).

92. As discussed above, the same principles should be applied to substantive due process analysis, as both doctrines are the opposite side of the same coin—embracing concepts of equality and liberty to define the personal autonomy of the individual. For a discussion of these concepts, see *supra* notes 38–46 and accompanying text. Additionally, both Professor Sunstein and Justice O'Connor, in her concurrence in *Lawrence*, make use of the *Romer* decision as an example of where constitutional balancing had been utilized. *See Lawrence*, 539 U.S. at 584 (O'Connor, J., concurring) (declaring that equal protection clause does not toler-

Professor Sunstein has observed that the type of rational review utilized by the Supreme Court in *Romer* was more akin to intermediate scrutiny employed for gender classifications, rather than the traditional rational basis review utilized for tax or economic policy.[93] Under this constitutional sliding scale or balancing approach, a court should use rational review "with bite" in the equal protection context "when prejudice and hostility are especially likely to be present."[94]

Translating this "rational review with bite" test for the substantive due process context to focus primarily on liberty rather than equality, heightened scrutiny is also appropriate when the state is in danger of intruding into matters pertaining to sex and other personal and private issues.[95] Indeed, the *Lawrence* Court makes clear that the freedom to engage in certain intimate conduct is one such matter that deserves additional protection.[96]

---

ate discrimination against classes of individuals weighed against mere moral disapproval by the state); Sunstein, *supra* note 12, at 77 (highlighting potential invalidity of *Romer* rationality test as current notions of equal protection doctrine developed in contemporary case law); *see also* Hunter, *supra* note 4, at 1118 (asserting that Justices Kennedy, Stevens and Souter are moving Court toward more flexible analytical structure for evaluating substantive due process). Just as Justice O'Connor's searching form of rational basis review has been implicitly adopted in the substantive due process context, it is also clear that the *Lawrence* Court is applying a version of constitutional balancing analysis to the substantive due process context as well. For a discussion of this balancing, see *infra* note 98 and accompanying text.

93. *See* Sunstein, *supra* note 12, at 77 (suggesting that rational review in *Romer* was closer to intermediate review). As pointed out above, this constitutional balancing approach derives directly from Justice Marshall's famous argument in favor of a "sliding scale" rather than a tiered approach to equal protection issues. *See Rodriguez*, 411 U.S. at 124–25 (Marshall, J., dissenting) (noting that Court demands clear showing of legitimate state interests when issues of constitutional importance are at stake). Professor Sunstein also points out that this balancing approach derives from Justice Stevens' famous admonition that, "there is only one Equal Protection Clause." *See* Sunstein, *supra* note 12, at 77 (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 246 (1995) (Stevens, J., dissenting) (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 451–55 (1985) (Stevens, J., concurring))); *see also* Huhn, *supra* note 76, at 105 (explaining that sliding scale approach of Justice Stevens recognizes "continuum of judgmental responses" depending upon legitimacy and neutrality of reasons offered in support of law).

94. *See* Sunstein, *supra* note 12, at 78 (describing *Romer* as using rational review that strengthens the scrutiny with which Justices may review sex discrimination suits).

95. *See Lawrence*, 539 U.S. at 572 ("These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."); *see also* Hunter, *supra* note 4, at 1114 (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990)) ("The recognition of a liberty interest not categorized as fundamental leads only to a balancing of the individual's interests and government's, not to any presumption against the statute in question.").

96. *See Lawrence*, 539 U.S. at 572 (noting protections given to adults regarding consensual sexual relationships). In addition to freedom to engage in certain intimate conduct, such spheres free from state intrusion might best be described as those spheres of privacy created by such cases as *Griswold*, *Roe* and *Casey*. *See* Tribe,

Looking at *Lawrence* through this analytical prism, it is evident that the Supreme Court applied heightened rational basis review to the Texas sodomy statute because it believed that Texas was intruding into a private and personal sphere of the convicted men's lives. But rather than applying a reflexive tiered approach through a more formal type of judicial review, the Court instead stated, "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[97] Implicit in this statement is a balancing of relevant individual and state interests.[98] Notice that the Court did not say that "the Texas statute is not rationally related to a legitimate state purpose." Rather, the Court balanced Texas' interest in promoting morality against the interests of the two convicted men in their personal and private lives, and found that the individuals' interests prevailed.[99] Thus, the *Lawrence* Court engaged in an implicit constitutional balancing act in arriving at its Millian moment.[100]

The conclusion regarding the *Lawrence* Court's Millian moment is theoretically important for the purpose of substantive due process constitutional analysis. In order to ascertain the real practical impact that this Millian approach to substantive due process might have in specific contexts involving personal relationships, however, it is necessary to consider one particularly controversial context: public university use of consensual relationship policies to ban some, or all, faculty-student relationships. It is to this endeavor that this article now turns its attention.

III. THE ADVENT OF FACULTY-STUDENT CONSENSUAL RELATIONSHIP POLICIES AT PUBLIC UNIVERSITIES

Until relatively recently, most universities did not have policies governing when, and if, a faculty member may be romantically involved with one of his or her students.[101] Instead, universities relied upon sexual harassment policies to deal with sexual advances and relationships that were, or became, unwanted from a student's point of view.[102] The thought ani-

supra note 4, at 1917 (discussing various standards of review used throughout Supreme Court substantive due process jurisprudence).

97. *Lawrence*, 539 U.S. at 578.

98. *Accord* Carpenter, *supra* note 4, at 1151 (arguing that use of "legitimate" in *Lawrence* is better understood as comment on comparative weakness of state's morality claim against strong interests of convicted men).

99. *See id.* at 1157 (interpreting *Lawrence* as weighing interests involving personal and private life of individual against state's "mere legitimate" interest in regulating morality).

100. *See* Huhn, *supra* note 76, at 105 (arguing that Justice O'Connor's *Lawrence* concurrence adopts stricter standard of review that is adjusted according to various factors, including whether or not law affects private living arrangements).

101. *See* Hutchens, *supra* note 15, at 411 (discussing motivations for increase of faculty-student consensual relations policies in universities and law schools).

102. *See* Sherry Young, *Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education*, 4 AM. U. J. GENDER SOC. POL'Y & L. 269, 278 (1996) (noting that most universities and colleges have some form of sexual harassment

mating this laissez-faire approach was not based on any civil libertarian ideal embraced by these universities, but rather by a hope that they could, through sexual harassment policies, properly ferret out unwanted sexual conduct by faculty members.[103]

In retrospect, this "liberal" approach to faculty-student relationships appears overly naïve in its outlook for two primary reasons. First, the concept of consent has no, or a different type of, meaning in a relationship with such a large power differential.[104] In other words, students would not file sexual harassment complaints against their professors, but rather remain silent and feel forced to engage in such relationships for fear of retribution in the form of a bad grade or bad recommendation.[105] Although this notion in its unadulterated form lacks persuasive punch, the power dynamic at play cannot be completely disregarded.[106]

Second, sexual harassment law cannot single-handedly take into account relevant third party interests when it comes to determining the viability of consensual relationships.[107] That is, even if two adult individuals were completely happy with their relationship (assuming some meaningful consent on the student's part), others,including third-party professors and students, as well as the university itself, could be substantially harmed by the existence of such a consensual relationship on campus.[108] Such harm might take the form of the tarnishing of a university's reputation,

policy in place that regulates relationships between students and faculty members).

103. *See* Richard R. Carlson, *Romantic Relationships Between Professors and Their Students: Morality, Ethics and Law*, 42 S. TEX. L. REV. 493, 499 (2001) ("[T]he vast gray areas of sexual harassment law leave little if any room for a truly safe relationship, and they create at least some risk in any romantic, amorous or intimate behavior with students.").

104. *See, e.g.*, CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 298 n.8 (1979) ("whether, under conditions of male supremacy, the notion of consent has any real meaning for women . . . whether it is a structural fiction to legitimize the real coercion built into the normal social definitions of heterosexual intercourse").

> Because the faculty member and his or her colleagues are responsible for grading the student, for writing recommendations, and for providing references that will impact the student's life and career, the faculty member's institutional role enacts a power imbalance even when faculty and students are close in age or of the same sex.

Margaret H. Mack, *Regulating Sexual Relationships Between Faculty and Students*, 6 MICH. J. GENDER & L. 79, 94 (1999).

105. *See* Secunda, *supra* note 16, at 64 (explaining assorted pressures placed upon students in sexual relationships with faculty members).

106. *See id.* at 80–84 (discussing sliding scale approach to faculty-student consensual relationship policies).

107. *See* Mack, *supra* note 104, at 97 (exploring need for equity and trust within educational settings, and how that equity and trust becomes lost when students hear about their professor having romantic relationships with other students).

108. *See* Secunda, *supra* note 16, at 63 (stating that, while students worry about being treated less favorably, faculty members involved in these relationships lose respect from their colleagues and risk potential sexual harassment lawsuits).

liability imposed against the university once the relationship goes sour and a sexual harassment suit is brought, the loss of academic integrity and collegiality in the faculty ranks and the perceived and/or real bias experienced by fellow classmates of the student-lover.[109]

A number of public universities have now responded to this criticism by ratcheting up the amount of protection given to students finding themselves in consensual relationships with their professors by adopting so-called "advisory" policies, which strongly discourage these relationships[110] and/or require those who engage in such relationships to disclose such

109. *See id.* at 60 (explaining lingering negative effects of faculty-student relationships).

110. *See id.* at 61–62 (discussing theory that professors should not participate in relationships with students they supervise or advise). *See, e.g.*, MICHIGAN STATE UNIVERSITY, *Conflict of Interest in Educational Responsibilities Resulting from Consensual Amorous or Sexual Relationships* (Nov. 8, 1996), *available at* http://www.msu.edu/unit/provost/amrelpol.htm (requiring staff to report any consensual relationships to their relevant unit administrator); OHIO STATE UNIVERSITY, OFFICE OF HUMAN RESOURCES, *Policies and Procedures, Sexual Harassment Policy 1.15, III. Regulations, A. Consensual Relationships* (Mar. 5, 2004), *available at* http://hr.osu.edu/policy/policyhome.htm ("Consensual romantic and sexual relationships between supervisor and employee or between faculty and student are strongly discouraged."); PENNSYLVANIA STATE UNIVERSITY, *Policy AD41 Sexual Harassment, Consensual Relationships* (Jan. 3, 2000), *available at* http://lsir.la.psu.edu/workfam/lir497/Ad41.html ("Romantic and/or sexual relationships between faculty and students, staff and students or supervisors and subordinate employees are strong discouraged."); UNIVERSITY OF ARKANSAS, FAYETTEVILLE, *Sexual Harassment Policy, Consensual Relationships* (Feb. 1998), *available at* http://www.uark.edu/depts/ofaa/policy.html ("Even when both parties have consented to a relationship, it is the faculty member, administrator, or supervisor who may be held accountable for unprofessional behavior."); UNIVERSITY OF KANSAS, *University Policies, Policy on Consenting Relationships* (Feb. 1, 1994), *available at* http://www.provost.ku.edu/consenting_relations_policy.html ("University of Kansas strongly disapproves of consenting relationships . . . ."); UNIVERSITY OF MAINE, OFFICE OF EQUAL OPPORTUNITY AND DIVERSITY, *University of Maine System Guidelines Regarding Consenting Relationships* (Nov. 1990), *available at* http://www.umaine.edu/eo/Policy/consenting.htm ("The policy strongly discourages consenting relationships when one of the participants has power or authority over the other, but does not prohibit them outright."); UNIVERSITY OF MISSISSIPPI, *A Handbook for Faculty and Staff, Sexual Harassment Guidelines and Procedures for Faculty, Staff and Students, II.B. Consensual Relationships, available at* http://www.olemiss.edu/depts/HR/handbook/HB_sec2.html (last visited Oct. 25, 2004) ("consensual sexual relationships between the instructional staff and students, as well as those between supervisors and their subordinates, are considered unwise and are strongly discouraged"); UNIVERSITY OF TEXAS AT AUSTIN, *Revised Handbook of Operating Procedures, Policy Number 4.A.2: Consensual Relationships* (Nov. 1, 2001), *available at* http://www.utexas.edu/policies/hoppm/04.A.02.html ("[T]he University strongly discourages consensual relationships between supervisors and subordinates, teachers and students and advisors and students."); UNIVERSITY OF UTAH, *Faculty Handbook: Section III, 3.12 Sexual Harassment and Consensual Relationships, available at* http://www.admin.utah.edu/fhb/section_iii.html (last visited Oct. 25, 2004) ("Romantic or sexual relationships between a faculty member and a student are generally unwise . . . ."); UNIVERSITY OF WISCONSIN AT MADISON, *Sexual Harassment Information and Resources, Consensual Relationships* (Oct. 23, 2002), *available at* http://www.wisc.edu/edrc/sexualharassment/consent.html (requiring staff to report any consensual relationships to their supervisor).

relationships so that the conflict of interest may be resolved.[111] Additionally, and more troublesome from a civil libertarian point of view, a significant number of public universities have responded by banning outright what they deemed the most problematic of these faculty-student consensual relationships: those involving a clear conflict of interest.[112] In defining a conflict of interest, however, these universities do not consider the actual specific conflicts that arise in individual circumstances, but rather have adopted administratively convenient rules of thumb.[113] Under these policies, although there are some variations,[114] a professor is normally banned from engaging in a romantic relationship with a student whom he or she currently grades, supervises or otherwise evaluates.[115] On the other hand, nonsupervisory relationships between a faculty member and a student at the same university are either vaguely discouraged[116] or not addressed at all.[117]

---

111. Such conflicts of interests may be resolved in a number of ways, including moving the student out of the class, substituting professors for the course or having an outside third party closely monitor the classroom situation. *See* Hutchens, *supra* note 15, at 422 (citing HUMAN RESOURCES, SYRACUSE UNIVERSITY, *Sexual Harassment Prevention Policy and Procedures* (2003), *available at* http://sumweb.syr.edu/ir/apm/Vphrgr/humres/appsex.html#conrel) (describing Syracuse University's graduate student consensual relationship policy as one in which faculty members are instructed to "take whatever steps are needed to avoid a conflict of interest. This requires reporting the relationship to an appropriate supervisor, who will then arrange for other forms of evaluation or monitoring.").

112. *See* Secunda, *supra* note 16, at 62–64 (highlighting most troublesome type of faculty-student sexual relationships).

113. For a further discussion of procedural and administrative strategies for deterrence of student-faculty sexual relationships, see *supra* note 15 and accompanying text.

114. *See* Hutchens, *supra* note 15, at 420–22 (contrasting consequences of universities' mandatory policies by which some faculty members may be removed from authority or subject to disciplinary action if they engage in sexual relationships with students).

115. *See* Secunda, *supra* note 16, at 62–63 (discussing dangers of conflict of interest faculty-student relationships).

116. *See id.* at 84 (suggesting that nonsupervisory relationships may also have detrimental effects). For an example of such policies, see UNIVERSITY OF MINNESOTA, *Policy on Sexual Harassment and Consensual Relationships* (1998), *available at* http://www1.umn.edu/usenate/policies/sexualharass.html (referring to individuals' freedom of association in context of prohibitive behavior that "create[s] conflicts of interest.") and UNIVERSITY OF NEVADA-LAS VEGAS, *Consensual Relationship Policy, available at* http://hr.unlv.edu/Diversity/Policy_Statements/Consensual_Relations.html (last visited Oct. 25, 2004) (punctuating how consensual relationships between faculty members and students do not fall under policy so long as neither party directs authority over other party).

117. *See* Secunda, *supra* note 16, at 84 (discussing possible detrimental effects of not addressing non-conflict of interest faculty-student relationships). For examples of such policies, see UNIVERSITY OF NORTH TEXAS, *Policy Manual, Consensual Relationships* (2000), *available at* http://www.unt.edu/policy/UNT_Policy/volume1/1_3_23.html (failing to address nonsupervisory relationships) and UNIVERSITY OF TEXAS AT ARLINGTON, *Fiscal Regulations and Procedures, Equal Opportunity and Affirmative Action: Sexual Harassment, Sexual Misconduct and Consensual Relationships* (Sep. 12, 2003), *available at* http://www3.uta.edu/policy/fisregs/eoaa/3A-1.htm

Last, the prohibitory approach, the most restrictive type of faculty-student consensual relationship policy, has rarely been adopted by universities.[118] Under this approach, the university bans all supervisory and nonsupervisory sexual relationships between faculty and students. Because of the serious constitutional privacy and intimate association concerns these policies raised, even prior to *Lawrence*, their scarcity is hardly surprising.[119]

Sanctions under these conflict of interest policies for engaging in such prohibited conduct can be quite severe, ranging anywhere from a verbal reprimand to an outright dismissal from employment.[120] Nevertheless, the damage done to a professor's career by being labeled a sexual predator by his or her public university may be tantamount to ruining any future academic career opportunities. Such punishment for a relationship, which could conceivably be construed as voluntary between two consenting adults, appears out of proportion to any potential harm inflicted on third parties.

Because of the inadequacy of the laissez-faire, advisory, conflict of interest and prohibitory approaches to faculty-student consensual relationship policies, elsewhere I have laid out an argument, from mostly a policy standpoint, for a sliding scale approach to faculty-student consensual relationship policies.[121] This argument asserts that the conflict interest approaches are either underinclusive, overinclusive or both.[122] Conflict of interest policies are underinclusive because they only vaguely address nonsupervisory relationships, although nonsupervisory relationships may nevertheless cause real conflicts of interests with regard to other students,

---

(defining misconduct as including only those relationships which arise out of authoritative relationships).

118. *See* Hutchens, *supra* note 15, at 422 (citing COLLEGE OF WILLIAM AND MARY, *Revised Policy on Consensual Amorous Relations* (Oct. 23, 2001), *available at* http://www.wm.edu/provost/consensual_relation.pdf). With the exception of William & Mary, where the ban only applies to undergraduate students, I am aware of no other public, higher-education institutions having adopted this more draconian prohibitory approach. *See* Secunda, *supra* note 16, at 64–66 (discussing complete bans on consensual faculty-student relations).

119. *See* Secunda, *supra* note 16, at 66 (discussing zero-tolerance polices in lieu of importance of being able to freely associate with others).

120. *See, e.g.*, UNIVERSITY OF IOWA, *Policy on Consensual Relationships Involving Students* (July 1, 2002), *available at* http://www.uiowa.edu/~eod/policies/pol-on-consensual/pol-consensual-full.html (contemplating dismissal of faculty members who violate policy); UNIVERSITY OF NEVADA AT RENO, *Policy on Consensual Sexual Relationships*, *available at* http://www.unr.edu/sapd/documents/UNIVERSITY POLICYONCONSENSUALSEXUALRELATIONSHIPS_000.pdf (last visited Oct. 25, 2004) (explaining that verbal or written warning will be given to both involved parties).

121. *See generally* Secunda, *supra* note 16 (proposing effective standard of sliding scale to address consensual relationships between students and faculty members).

122. *See id.* at 80–81 (discussing shortcomings of other consensual approaches).

professors or to the university itself.[123] Conversely, these policies are significantly overinclusive because not every supervisory relationship causes a conflict of interest that is insurmountable and/or because even if such conflicts exist, the associational and privacy rights of the faculty member may be deemed to supersede any relevant third party interests, at least in some circumstances.[124]

In the wake of the Supreme Court's landmark decision in *Lawrence*, it is now also clear that the sliding scale approach to faculty-student relationships is the only approach that is constitutionally sound.[125] But before considering the constitutionality of consensual relationship policies at public universities that ban some or all faculty-student relationships, it is first necessary to analyze the impact, if any, that the *Lawrence* decision should have on faculty-student consensual relationship policies. At least one commentator has argued that *Lawrence* may not be relevant for faculty-student consensual relationship policies based on specific language in the majority opinion.[126] Furthermore, and more significantly, an important question that must be answered is whether a case dealing with criminal prohibitions (i.e., *Lawrence*) has any precedential value for a case involving unconstitutional conditions in the public employment context (i.e., a future case involving the constitutionality of faculty-student relationship policies that ban some, or all, such relationships).

IV. SHOULD *LAWRENCE* APPLY TO CONSENSUAL RELATIONSHIP POLICIES THAT BAN SOME, OR ALL, FACULTY-STUDENT RELATIONSHIPS?

On its face, and most narrowly read, *Lawrence* only addresses the right of homosexual adults to engage in private, intimate and consensual conduct free from criminal prosecution.[127] Nevertheless, from the breadth of

123. *See id.* at 80 (explaining why conflict of interest and prohibitory approaches are underinclusive).

124. *See id.* (explaining shortcomings of prohibitory and conflict of interest approaches).

125. For further critical discussion on the constitutionality of the sliding scale test applied in *Lawrence*, see *infra*, notes 203–31 and accompanying text.

126. *See* Hutchens, *supra* note 15, at 426 (stating that *Lawrence* may offer limited assistance to individuals challenging these policies, and its application to consensual relationships remains somewhat doubtful).

127. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("This case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives."). In fact, conservative courts around the country have already used this aspect of *Lawrence* to narrowly construe the liberty interest described in *Lawrence*. *See* Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1240 (11th Cir. 2004) ("[W]e decline to extrapolate from *Lawrence* and its *dicta* a right to sexual privacy triggering strict scrutiny."), *reh'g and reh'g en banc denied*, No. 02-16135DD (11th Cir. Sept. 24, 2004), *petition for cert. filed*, (U.S. Dec. 17, 2004) (No. 04-849); Lofton v. Sec'y of the Dep't of Children and Family Servs., 358 F.3d 804, 816 (11th Cir. 2004) ("We are particularly hesitant to infer a new fundamental interest from an opinion whose language and reasoning are inconsistent with standard fundamental rights analysis."), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir.

the language that Justice Kennedy employs in the majority decision, *Lawrence* signals the adoption of a much more broad-based notion of individual autonomy.[128] This vigorous Millian notion of individual autonomy finds its expression in *Lawrence*'s innovative approach to substantive due process.[129] Viewed in this light, *Lawrence* not only frees homosexuals engaging in private conduct in their bedrooms from criminal prosecution, but also applies to all individuals who seek to have the government respect their personal autonomy.[130] Nevertheless, there are still two potential hurdles, which proponents of applying *Lawrence* more broadly to the public employment context must overcome.

First, it must be determined whether certain language utilized by the majority in *Lawrence* exempts state interference with faculty-student consensual relationships, as these relationships potentially represent instances in which "consent might not be easily refused," when "abuse of an institution protected by the law" is involved or where "public conduct" is involved.[131] All three of those instances represent specific types of conduct that the majority in *Lawrence* exempted from its holding. That being said, a close exegesis of these phrases makes clear that these sweeping

---

2004), *cert. denied*, 73 U.S.L.W. 3247 (U.S. Jan. 10, 2005) (No. 04-478); State v. Limon, 83 P.3d 229, 234–35 (Kan. Ct. App. 2004) (looking at *Lawrence* narrowly by not applying its holding to cases involving minors), *review granted*, (May 25, 2004); Standhardt v. Superior Court, 77 P.3d 451, 456–60 (Ariz. Ct. App. 2003) ("[W]e reject Petitioner's contention that *Lawrence* establishes entry in same-sex marriages as a fundamental right."), *review denied*, (May 25, 2004). *But see* Goodridge v. Dep't of Pub. Health, 798 N.E. 2d. 941, 948 (Mass. 2003) (reading *Lawrence* to affirm "the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution [which] precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner").

128. For a further discussion of individual autonomy, see *supra* notes 36–37 and accompanying text. *But see Williams*, 378 F.3d at 1238 (finding that *Lawrence* does not stand for broad reading of right to sexual privacy).

129. For a further discussion of the relationship between this original approach to substantive due process and equal protection, see *supra* notes 38–100 and accompanying text.

130. Indeed, and if for no other reason, elementary principles of equal protection require that *Lawrence*'s holding apply equally to heterosexual couples engaged in the same conduct. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (stating Equal Protection Clause of Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike").

131. *See Lawrence*, 539 U.S. at 578 (substantiating one's right to private sexual conduct without government intrusion through Fifth and Fourteenth Amendments). While Justice Kennedy concludes that Texas has no legitimate interest in outlawing private sexual behavior, he resounds a "promise of the Constitution" afforded to all adult citizens entitled to private behavior. *See id.* (detailing origin and scope of privacy rights constitutionally provided to adults participating in consensual sexual activity) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992))).

pronunciations do not properly apply to faculty-student consensual relationship policies in the public university context.[132]

Second, it must be considered whether the government as employer has more discretion to interfere with its employees' private relationships than the state did in *Lawrence* when it was acting to impose criminal sanctions in its role as sovereign.[133] Although the state does have more discretion in the employment context, a constitutional balancing, similar to the one discussed in Part II.C, must be undertaken to weigh the relevant state and individual interests involved.[134]

An analysis of *Lawrence* does not indicate that public university policies should be exempt based on either of these legal hurdles. Therefore, it must be determined how a court should constitutionally balance the relevant interests involved when public universities seek to ban some or all of these faculty-student relationships. This article contends that application of this new form of substantive due process countenanced in *Lawrence* to these consensual relationship policies in the public university context leads to the inexorable conclusion that such policies are unconstitutionally overbroad and impose an undue burden on faculty member's rights to privacy and intimate association.[135]

A. *University Regulation of Student-Faculty Consensual Relationships is Not Exempted from* Lawrence *as a Result of Any of Its Specific Language*

While it is the contention of this article that the *Lawrence* Court applied a heightened form of rational basis review in order to protect the right to form personal and private relationships,[136] the Court in *Lawrence* emphasized that its holding did not apply to certain forms of intimate conduct involving minors, coercion or public conduct.[137] Succinctly put,

132. For a discussion of *Lawrence*'s impact on public universities' faculty-student relationship policies, see *infra* notes 136–69 and accompanying text.

133. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (recognizing public school teacher's right to speak out on matters of public concern without facing adverse employment consequences, as well as distinction between government as employer and government as sovereign). *Pickering* is the watershed case addressing the doctrine of unconstitutional conditions in public employment. *See id.* at 568 ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."); *see also* Connick v. Myers, 461 U.S. 138, 142–54 (1983) (refining doctrine of unconstitutional conditions for public employees in context of First Amendment speech).

134. For a further discussion of *Lawrence*'s application to faculty-student relationship policies, see *infra* notes 170–89 and accompanying text.

135. For a further discussion of the unconstitutional overbreadth of conflict of interest and prohibitory faculty-student relationship policies after *Lawrence*, see *infra* notes 190–202 and accompanying text.

136. For a further discussion of *Lawrence* and its reasoning, see *supra* notes 47–89 and accompanying text.

137. See Lawrence v. Texas, 539 U.S. 558, 578 (2003) (excluding certain sexual actors from holding of case); *see also* Schwartz, *supra* note 4 (addressing consti-

Lawrence recognizes an important limitation on the rights to privacy and intimate association in certain nonconsensual and public circumstances. For instance, an adult individual does not have the right to engage in private sexual relations with a minor (even if the minor freely consents to such conduct),[138] a man does not have the right to rape a woman in the privacy of his own home[139] and individuals are not free to engage in public sex acts.[140] Recognizing the nonconsensual and/or public nature of these types of conduct, society has generally moved to protect the victims of such conduct.[141] All of this is consistent with a Millian notion of personal autonomy.[142]

Nevertheless, there are parts of the *Lawrence* opinion that facially appear to give public universities greater latitude in protecting their interests against the harms sometimes caused by faculty-student consensual relationships. It is to a consideration of this specific language that this article now turns.

1. *"Persons . . . who are situated in relationships where consent might not be easily refused"*

In a recent law review article, Neal Hutchens argued that *Lawrence* "may offer limited assistance to an individual challenging a [faculty-student consensual relationship] policy."[143] According to Mr. Hutchens, one

---

tutionality of criminalized homosexual activity as narrow target amidst exaggerated history of prohibition relayed in *Bowers*); Stein, *supra* note 11, at 281 (contrasting clarity of Justice Kennedy's narrow application of *Lawrence* to Justice Scalia's arguably nebulous opinion as to how *Lawrence* "undermines laws against non-consensual sex").

138. All of these exceptions are consistent with Mill's libertarian philosophy. For instance, Mill explains that minors are not able to fully exercise their autonomy because they are not yet fully developed, mature individuals. *See* MILL, *supra* note 2, at 11 (noting that doctrine does not apply to persons below age that law fixes as that of manhood or womanhood).

139. Under a Millian analysis, this type of criminal conduct would be "other-regarding" and clearly subject to state regulation and punishment. *See id.* at 87 (acknowledging that actions prejudicial to interests of others may be subject to punishment).

140. *See id.* at 91 (discussing limits to legality of acts injurious only to actors themselves). Mill states:

> [T]here are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners, and coming thus within the category of offences against others, may rightly be prohibited. Of this kind are offences against decency . . . .

Id.

141. *See* Stein, *supra* note 11, at 281 (challenging claim that "ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation") (quoting *Lawrence*, 539 U.S. at 589 (Scalia, J., dissenting))).

142. For a discussion of the Millian notion, see *supra* notes 138–40 and accompanying text.

143. Hutchens, *supra* note 15, at 426.

such reason is that faculty-student relationships represent a type of relationship "where consent might not easily be refused" because of the power disparity in such relationships.[144] He thus doubts whether *Lawrence* provides any legal cover for faculty members at public universities who engage in consensual relationships with their students.[145]

This article rejects this narrow reading of the *Lawrence* decision on at least two bases. First, this narrow reading of *Lawrence* takes the Court's language out of context. *Lawrence* includes other examples of nonconsensual intimate conduct, including criminal conduct involving minors, prostitution and other relationships where a person might be "injured or coerced."[146] Read in this context, Justice Kennedy's comments in *Lawrence* concerning what this case does *not* involve clearly separates consensual intimate conduct from nonconsensual intimate conduct.[147] It is the premise of this article that relationships between professors and students, like homosexual private intimate relations, may, and often do, occur on the consensual side of the line.[148]

Nevertheless, some commentators believe that consent can never have any meaning in the midst of a power relationship, such as that between a professor and student.[149] This view appears to be the position of a small minority.[150] More rationally, the power dynamics of these relation-

144. *See id.* (citing *Lawrence*, 539 U.S. at 578) (asserting reasons why *Lawrence* probably does not effect university consensual relationship policies).

145. *See id.* (concluding that "[t]he extent to which *Lawrence* limits consensual relationship policies at public universities and colleges remains somewhat doubtful").

146. *See Lawrence*, 539 U.S. at 578 (distinguishing *Lawrence* facts from other situations). As Professor Edward Stein has commented, "[t]he state clearly has compelling reasons beyond the moral disapproval of its citizens for laws that prohibit non-consensual sexual activities, namely that such laws protect the non-consenting party (e.g., a young child, an animal, or a young family member) from harm." Stein, *supra* note 11, at 281. For a discussion of Mill's perspective on nonharmful activity, see *supra* note 26 and accompanying text.

147. *See Lawrence*, 539 U.S. at 578 (discussing specific facts of case). In other words, nonconsensual intimate conduct can be properly punished by the state based on legitimate interests beyond the mere promotion of morality. In those cases, harm to others is involved and the state always has been considered to have the ability to protect public health and public safety. *See* Goldberg, *supra* note 13, at 1254–56, 1259 (discussing morals-based laws and their justifications); *see also supra* note 26 and accompanying text.

148. Where such consent is absent, the federal and/or state law of sexual harassment (as well as the criminal law of rape) may be implicated and faculty-student consensual relationship policies are irrelevant. For the sake of argument, this article assumes that the faculty-student relationships under consideration are consensual, even though this is often one of the thorniest issues to resolve once such a relationship has gone south. *See* Secunda, *supra* note 16, at 60 ("[I]t is not always so easy to determine whether a sexual relationship is consensual or nonconsensual. The answer to such a question may sometimes change day-to-day given the volatile nature of these relationships.") (footnote omitted).

149. For a discussion of this view, see *supra* note 104 and accompanying text.

150. We know that this is the view of a small minority of those in the academy because to take this view to its logical conclusion would require the adoption of a

ships that lead to university concerns should be balanced against the rights to privacy and intimate association elaborated upon in the *Lawrence* decision.[151] Rather than completely denying such individual rights in all circumstances, individual cases need to be analyzed by weighing the relevant state and individual interests at stake before permitting the state to infringe upon the personal autonomy of its employees.[152] Any more restrictive interpretation of the rights to privacy and intimate association recognized in *Lawrence* would be draconian and unjustified in light of the significant number of anecdotal stories relating mutually satisfying faculty-student relationships.[153]

2. *"Absent injury to a person or abuse of an institution the law protects"*

Another reason that Mr. Hutchens asserts for why university consensual relationship policies may be exempt from this wider notion of personal autonomy espoused by *Lawrence* is because of language in which the *Lawrence* Court counsels "against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries *absent injury to a person or abuse of an institution the law protects.*"[154] In this vein, Mr. Hutchens argues that this language gives ample wiggle room for courts to defer to the policy judgments of universities and colleges to regulate intimate relationships between faculty and students.[155]

This reading of the *Lawrence* decision is flawed for at least two reasons. First, even Mr. Hutchens recognizes that the *Lawrence* Court is probably not talking about an institution like a university or college, but is instead referring to an institution like marriage.[156] Indeed, throughout the ma-

---

prohibitory approach to consensual relationships, banning both supervisory and nonsupervisory relationships. At present, only one public university, William & Mary, has adopted such a policy, and then, only in the undergraduate context. For additional comment on complete bans on faculty-student relationships, see *supra* note 118 and accompanying text.

151. This approach is consistent with the balancing of state and individual interests required under the *Pickering* unconstitutional conditions doctrine. *See* Pickering v. Bd. of Ed., 391 U.S. 563, 568 (1968) (determining that there must be balance between teacher's interests and state's interest). For a discussion of the similarity of these approaches in greater detail, see *infra* notes 170–89 and accompanying text.

152. For a discussion of this sliding scale approach to faculty-student relationships, see *infra* notes 170–89 and accompanying text.

153. *See* Dan Subotnik, *What's Wrong With Faculty-Student Sex?—Response II*, 47 J. LEGAL EDUC. 441, 442 (1997) (criticizing argument that there needs to be absolute ban on faculty-student sex because of power imbalance).

154. Lawrence v. Texas, 539 U.S. 558, 567 (2003) (emphasis added); *see also* Hutchens, *supra* note 15, at 426 (citing *Lawrence*, 539 U.S. at 567) (asserting reasons why *Lawrence* probably does not apply to university consensual relationship policies).

155. *See* Hutchens, *supra* note 15, at 426 (discussing possibility that colleges and universities may still legally enact consensual relationship policies).

156. *See id.* (noting that Justice Kennedy was probably more concerned with institution of marriage); *see also* Carpenter, *supra* note 4, at 1153 (analyzing this

jority opinion, Justice Kennedy is attempting to exempt the institution of marriage from *Lawrence*'s sweeping language to refute Justice Scalia's contention, in dissent, that the holding in *Lawrence* will inevitably lead to a right to same-sex marriage.[157] Moreover, because this statement is made in the context of states and courts interfering with the "meaning of relationships," it is highly unlikely that Justice Kennedy was referring to institutions of higher education when making this statement.[158]

Second, Mr. Hutchens pays insufficient notice in his article to the recognized right to intimate association.[159] Instead, he limits his discussion to cases discussing "associational rights at public colleges or universities" in the First Amendment context and finds, not surprisingly, "the cases [to be] of limited usefulness" for consideration of constitutional challenges to public universities' consensual relationship policies.[160] On the contrary,

---

language under assumption that institution so described by *Lawrence* is marriage); Tribe, *supra* note 4, at 1950 (discussing this language in relation to same-sex marriage).

157. *See Lawrence*, 539 U.S. at 604–05 (Scalia, J., dissenting) (arguing that *Lawrence* majority destroyed grounds to distinguish between heterosexual and homosexual unions). Justice Scalia stated:

> [T]he Court says the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Do not believe it . . . . This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.

Id. (Scalia, J., dissenting). Justice O'Connor also attempts to explain why her equal protection analysis does not concern homosexual marriage. *See id.* at 585 (O'Connor, J., concurring) (noting that this law's failure does not mean that all laws that make distinctions between heterosexuals and homosexuals would also automatically fail). Although I agree with Justice Scalia that concepts of equal protection and substantive due process do require formal recognition of homosexual marriages, I do not believe that Justice Kennedy so holds in his majority decision in *Lawrence* and, in fact, he and Justice O'Connor bend over backwards not to so hold. *See* Stein, *supra* note 11, at 275–76 (noting that Justices Kennedy and O'Connor stated that their reasoning does not lead to conclusion that laws defining marriage as between two people of opposite sex are constitutional).

158. Even if a court were to construe "institutions" to refer to higher education institutions, this interpretation may run afoul of the Establishment Clause. *See* Arnold H. Loewy, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159, 161 (2003) (proposing test to determine whether statute violates Establishment Clause). Under Professor Loewy's proposed test:

> If the activity involves morality simpliciter, i.e., the legislature simply condemns the activity because it is immoral, the law should be held to violate the Establishment Clause. On the other hand, if the legislation is predicated on purposive morality, i.e., morality that serves a secular function, the law should be sustained.

Id. Thus, if there is evidence that the public university administration's approach is animated by primarily religious concerns, such as prohibiting premarital fornication, such policies should be stricken down under the Establishment Clause.

159. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984) (noting different lines of freedom of association cases, including right to intimate association).

160. *See* Hutchens, *supra* note 15, at 426–27 (finding that most cases dealing with associational rights are focused on restrictions placed on funding for campus groups).

what is at stake in these faculty-consensual relationships is not some general associational right to join a group or club under the First Amendment, but the right to intimate association between two consenting adults, which the Court has placed squarely at the heart of the substantive component of the Due Process Clause of the Fourteenth Amendment.[161] It is this precedent, which supports the Millian notion of personal autonomy, that Justice Kennedy espouses in his *Lawrence* opinion. Viewed further in this light, it is clear that Justice Kennedy could not have been referring to institutions of higher learning when acknowledging that states may interfere with personal relationships if there is "abuse of an institution the law protects."[162]

3. *Persons engaged in "public conduct or prostitution"*

Of course, one might also argue that because faculty-student relationships rarely ever remain strictly private (regardless of the best intentions of the parties),[163] this conduct falls into the category of "public conduct" exempted from the general holding of *Lawrence*.[164] This interpretation of the Court's language is untenable. "Public conduct," as used by the Court, concerns commercial behavior like prostitution, which is mentioned conjunctively in the same sentence as "public conduct."[165] On the other hand, the Court specifically recognizes that the rights to privacy and intimate association are not constrained by spatial limits.[166] Instead, it encompasses a right to autonomy in its more "transcendental dimensions."[167]

All in all, a better reading of *Lawrence* permits its application to relationships between faculty members and students, who are both adults as

161. *See Roberts*, 468 U.S. at 620 (recognizing that certain associational relationships are intrinsic to personal liberty).

162. Mr. Hutchens also suggests that any successful challenge to a consensual relationship policy would require that a plaintiff overcome arguments that universities and colleges have a special status that requires courts to defer to their policy judgments. *See* Hutchens, *supra* note 15, at 428–29 (discussing deference given to universities to "preserve the integrity of the academic process"). I have argued elsewhere that even though public universities have a special status under the law when making academic decisions, no such judicial deference is due when a college undertakes a disciplinary action. *See* Secunda, *supra* note 16, at 74–77 (discussing limits on judicial deference when dealing with disciplinary action). Disciplining a professor for engaging in a consensual relationship with a student is a disciplinary decision due no deference by courts, especially where the constitutional rights to privacy and intimate association are involved. *See id.* (same).

163. *See* Secunda, *supra* note 16, at 81 (noting how private consensual relationships may become public).

164. *See* Lawrence v. Texas, 539 U.S. 563, 578 (2003) (discussing what case did and did not involve).

165. *See id.* ("It does not involve public conduct or prostitution.").

166. *See id.* at 562 ("Freedom extends beyond spatial bounds."); *see also* Tribe, *supra* note 4, at 1950–51 (arguing that intimacy, companionship and love are phenomena that have public, as well as private, facets).

167. *See Lawrence*, 539 U.S. at 562 (explaining conception of liberty).

far as the law is concerned and both capable of consensual conduct.[168] When it comes to private intimate conduct between two consenting adult individuals, one's liberty to engage in such conduct does not cease at the front door of one's home, as "there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence."[169]

B. *The Doctrine of Unconstitutional Conditions: Does* Lawrence *Even Apply to the Faculty-Student Consensual Relationship Context?*

Another significant argument that may be made as to why *Lawrence* should not apply to the faculty-student relationship context concerns the different roles the state plays: "as sovereign" versus "as employer."[170] On the one hand, because *Lawrence* involves a criminal prohibition concerning sodomy, the government was cast in the role of sovereign in that case.[171] On the other hand, in the higher education context, the government acts as an employer of the faculty member. The question is whether the government, as employer, has placed unconstitutional conditions on the faculty member's public employment by passing a constitutionally restrictive employment policy involving with whom he or she may engage in a relationship.[172]

In primarily the First Amendment speech context, the Supreme Court has observed that the government has more discretion in taking action against individuals in its role as employer than in its role as sover-

---

168. Under most state laws, an individual is no longer considered a minor after attaining the age of 18. *See generally* Alfred D. Mathewson, *Intercollegiate Athletics and the Assignment of Legal Rights*, 35 ST. LOUIS U. L.J. 39, 74 & n.158 (1990) ("The age of majority in many states is now 18 . . . ."). This article does not concern relationships between teachers and students under the age of majority, as such relationships would in most cases amount to the strict liability crime of statutory rape. *See* Leslie E. Wolf & Richard Vezina, *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?*, 25 WHITTIER L. REV. 821, 877–78 (2004) (observing that "[s]exual relations with minors have been criminalized as a way of protecting minors who are not yet capable of making informed decisions or protecting their interests").

169. *Lawrence*, 539 U.S. at 562.

170. *See* Pickering v. Bd. of Ed., 391 U.S. 563, 568 (1968) (discussing different state interests as sovereign and as employer).

171. The *Williams* case, which dealt with the commercial distribution of sexual aids, also took place in the government as sovereign context. *See* Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1240 (11th Cir. 2004) (holding that Alabama statute banning sale of sex toys was not unconstitutional), *reh'g and reh'g en banc denied*, No. 02-16135DD (11th Cir. Sept. 24, 2004), *petition for cert. filed*, (U.S. Dec. 17, 2004) (No. 04-849).

172. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06 (1967) ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.").

eign.[173] Nevertheless, under the *Pickering v. Board of Education*[174]/*Connick v. Myers*[175] line of cases, a court must "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[176] Moreover, under the parallel doctrine of unconstitutional conditions:

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.[177]

Both the *Pickering/Connick* line of cases and the doctrine of unconstitutional conditions have been historically limited to freedom of speech and association cases under the First Amendment.[178] Nevertheless, given the recent affirmation of the rights to privacy and intimate association in the *Lawrence* case, there does not appear to be any good reason to limit these doctrines to the First Amendment context. The Supreme Court, at least in dicta, in *Bishop v. Wood*,[179] appears to agree.[180] At bottom,

173. *See Pickering*, 391 U.S. at 568 ("[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

174. 391 U.S. 563 (1968).

175. 461 U.S. 138 (1983).

176. *Pickering*, 391 U.S. at 568; *see also Connick*, 461 U.S. at 142 (reaffirming this language as task for courts to handle).

177. Perry v. Sindermann, 408 U.S. 593, 597 (1972); *see also* FCC v. League of Women Voters, 468 U.S. 364, 400 (1984) (invalidating federal law providing that noncommercial radio and television broadcasters who "engaged in editorializing" could not receive federal grants); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977) (prohibiting conditioning of government employment on whether one makes contributions to particular political causes); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-8, 681 & n.29 (2d ed. 1988) (describing "unconstitutional conditions" doctrine as holding that although government may choose not to provide certain benefits altogether, it may not condition conferral of benefit, once provided, on beneficiary's waiver of constitutional right). It appears that the *Pickering/Connick* line of cases is closely related to the unconstitutional conditions cases, as the Supreme Court has considered *Pickering*'s progeny to include *Perry*. *See Connick*, 461 U.S. at 143 n.4 (listing progeny of *Pickering*).

178. The general principle that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression," has not been applied in any significant way outside of the First Amendment context. *Connick*, 461 U.S. at 142. *See generally* Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 810–16 (2003) (reviewing number of Supreme Court cases that establish that doctrine of unconstitutional conditions has been most vigorously applied in First Amendment context).

179. 426 U.S. 341 (1976).

180. *See id.* at 350 ("In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's consti-

whether the case is about expressive speech or private intimate conduct, both are constitutionally protected rights and the government, as employer, should not be able to willy-nilly infringe upon a public employee's constitutional rights.[181] Consistent with *Pickering* and *Bishop*, this article suggests that an unconstitutional conditions-type analysis is proper in the substantive due process context.[182] Under this analysis, as in *Pickering*, the constitutional interests of the public employees must be weighed against the state interest in promoting the efficiency of government services.[183]

This approach makes perfect sense if one considers the constitutional balancing approach discussed in relation to the new approach to substantive due process that *Lawrence* adopts.[184] Rather than answering the question as to whether a public university may condition a faculty member's employment on not engaging in a private, intimate relationship with a student in a clear-cut "yes" or "no" response, the answer must be "it depends." It depends on whether the government, as employer, is able to show that the private intimate conduct of its employees has a detrimental impact on the university environment.[185] As discussed above, this impact might take the form of tarnishing the university's reputation or subjecting the university to potential sexual harassment liability.[186] Such harm may also be in the form of the loss of academic integrity from the standpoint of interested third-party students and professors.[187]

In all cases, the relevant state and individual interests must be analyzed and weighed in order to determine whether the governmental interest in avoiding disruptions of the university environment outweigh the faculty member's right to engage in a private, intimate relationship with a student.[188] As will be discussed in detail below, although consensual relationship policies that ban some or all faculty-student relationships in the

---

tutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways.").

181. *See id.* (same).

182. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (holding that public employment may not be denied by unreasonable unconstitutional conditions on that employment); *see also Bishop*, 426 U.S. at 350 (discussing federal court review of unconstitutional conditions of employment).

183. *See Pickering*, 391 U.S. at 568 (establishing test for balancing of interests).

184. For a discussion of these approaches, see *supra* notes 90–100 and accompanying text.

185. *See* Secunda, *supra* note 16, at 80–84 (proposing approach to faculty-student consensual relationship based on nexus principle of labor arbitration law, which requires private conduct to have detrimental impact on workplace before employer may sanction it). For a discussion of the sliding scale approach to evaluate the required showing, see *infra* notes 203–31 and accompanying text.

186. For a discussion of the possible harm to the university, see *supra* note 109 and accompanying text.

187. For a discussion of any harm to third parties, see *supra* note 109 and accompanying text.

188. For a discussion of this balancing, see *supra* notes 90–100 and accompanying text.

public university context are unconstitutionally overbroad, the sliding scale approach to faculty-student consensual relationship policies adequately undertakes the necessary balancing of interests.[189] Therefore, only the sliding scale approach is consistent with the notion that the government as employer should have more discretion in intruding upon liberty interests than the state of Texas did in *Lawrence*, while simultaneously recognizing the importance of the faculty member's interests in privacy and intimate association.

C. *Public University Policies That Seek to Ban Some or All Faculty-Student Consensual Relationships Are Unconstitutionally Overbroad*

Having cleared away two potential obstacles in applying *Lawrence* to faculty-student consensual relationship policies, it is now necessary to determine what impact *Lawrence* has on policies that ban some or all faculty-student relationships. Prior to *Lawrence*, the judicial determination of the constitutionality of such policies probably would have turned on the absence of any traditional fundamental interest "deeply rooted in this Nation's history and tradition."[190] Furthermore, the university had more than enough legitimate reasons for prohibiting such relationships, ranging from the propensity of such relationships to interfere with the university's institutional and academic integrity to the institutional liability to which such relationships sometimes lead.[191]

After *Lawrence*, and because public universities, as surrogates of the state, are attempting through consensual relationship policies to intrude into areas of faculty members' lives pertaining to personal and private matters, heightened rational review is now proper.[192] This standard of judicial review stems from the *Lawrence* Court's implicit adoption of a similar heightened or searching standard in the substantive due process context, in order to be cognizant of the substantial interest that inheres in the rights to privacy and intimate association.

Unfortunately, the mere existence of the rights to privacy and intimate association, due some form of heightened rational basis review, does not answer the question of whether public university consensual relationship policies that ban some or all faculty-student relationships are constitutional. To arrive at the crux of the matter, it is necessary to consider how courts should weigh a faculty member's rights to privacy and intimate asso-

189. For a discussion of the sliding scale approach, see *infra* notes 203–31 and accompanying text.

190. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (examining two primary features of substantive due process analysis).

191. For a discussion of the ensuing harm that warrants such university policies, see *supra* note 109 and accompanying text.

192. For a discussion of heightened rational review, see *supra* notes 47–89 and accompanying text.

ciation against the relevant third party interests of the university and other interested students and faculty members.[193]

Because, in the wake of *Lawrence*, the rights to privacy and intimate association are now given substantial protection under the liberty interest contained in the substantive component of the Due Process Clause, the state must have more than just a traditional legitimate interest—it must have a superseding interest—to intrude into the professor's sphere of personal autonomy.[194] Based on *Lawrence*'s reasoning, the state may not burden an individual's liberty interest in this context based solely on the promotion of a majoritarian morality.[195] Rather, state regulation through the vehicle of a faculty-student consensual relationship policy must be based on a showing that there are state interests at play that are important and that outweigh any countervailing privacy or intimate association rights the faculty member may have. Such interests may include the interests of the public university to maintain its reputation and avoid liability and/or the interests of third-party faculty and students who seek to eliminate the existence, or perception, of favoritism or bias in the academic setting.[196] If such reasons are lacking, however, the university's actions disciplining a professor under such a policy should be considered invalid and the professor reinstated.

Although it will not be clear which way the constitutional scales will tip until the facts of individual cases are developed, what can be said without hesitation is that a public university policy promulgating a blanket rule prohibiting faculty-student intimate relationships in some or all situations is overbroad and represents an undue burden on the rights of the faculty member involved.[197] After *Lawrence*, a constitutionally sound consensual relationship policy must not completely disregard the very real constitu-

193. For an analysis of the weighing process, see *supra* notes 90–100, 170–89 and accompanying text.

194. For a discussion of the state's required interest, see *supra* notes 90–100 and accompanying text.

195. *See* Lawrence v. Texas, 539 U.S. 558, 582–83 (2003) (O'Connor, J., concurring) (asserting that moral disapproval is not rational basis for discrimination under Equal Protection Clause).

196. For a discussion of the possible interests of the university in creating prohibitive policies, see *supra* note 109 and accompanying text.

197. This "undue burden" language is borrowed from the *Casey* decision, in which the Court said that governmental abortion regulations must not have an undue burden on a woman's ability to have an abortion. *See* Planned Parenthood v. Casey, 505 U.S. 833, 879–901 (1992) (examining various regulations on abortion under undue burden test, such as spousal notification and informed consent). Professor Decker suggests that the *Casey* Court's invocation of undue burden to strike down certain Pennsylvania spousal notification limitations on the right to abortion smacks of an overbreadth-type analysis outside the First Amendment context. *See* Decker, *supra* note 21, at 91–92 ("[T]he abortion line of cases is the most prevalent example of the Court's use of overbreadth-type analysis outside the First Amendment arena."). I use "undue burden" in the faculty-student consensual relationship context to suggest overbreadth as well.

tional privacy and associational interests of the affected professor.[198] Even if faculty-student supervisory relationships will be permitted only in limited circumstances,[199] it is essential that such interests be given their due so as not to inadvertently diminish the importance of the privacy and associational rights recognized by the *Lawrence* Court.[200] The door must be left open to the possibility that in a given situation the substantial interests of the faculty member in those rights outweigh the interests of the public university. Therefore, public university policies, which seek to ban some or all faculty-student relationships, should be deemed unconstitutionally overbroad, placing an undue burden on faculty members' rights to privacy and intimate association.[201] Consequently, any public university faculty-student consensual relationship policy which bans outright some or all of these relationships, such as a conflict of interest or prohibitory consensual relationship policy, should be struck down or not adopted in the first place by public university administrators.[202]

V. A CONSTITUTIONALLY SOUND ALTERNATIVE: THE SLIDING SCALE APPROACH TO FACULTY-STUDENT CONSENSUAL RELATIONSHIP POLICIES

So what is the alternative to these unconstitutional consensual relationship policies that ban some or all faculty-student relationships? As opposed to those overbroad policies, a path not yet taken in the context of faculty-student consensual relationships is a sliding scale approach. Under this approach, consensual relationships are neither always permitted nor

198. *See* Secunda, *supra* note 16, at 83 (identifying professors' privacy interests in consensual sexual relations with students).

199. *See id.* at 82–83 (describing potential limited circumstances in which faculty member's interests may outweigh those of universities).

200. *See id.* (assessing "blanket prohibition on supervisory relationships in the higher education setting [as] inappropriate").

201. *See Casey*, 505 U.S. at 876 (suggesting that undue burden standard is apt standard for constitutional balancing tests by maintaining that "the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty"); *see also* Roe v. Wade, 410 U.S. 113, 164 (1973) (finding that Texas statute authorizing only medically advised abortions carried out to save life of mother "sweeps too broadly"); Decker, *supra* note 21, at 84 ("[A] governmental objective cannot be accomplished 'by means which sweep unnecessarily broadly[,] invading the area of protected freedoms.'") (quoting Griswold v. Connecticut, 381 U.S. 479, 485 (1965))) (alterations omitted).

202. Although private universities and colleges are generally not held to constitutional standards for the policy reasons discussed above, it is still in the best interest of private institutions of higher education to adopt such sliding scale approaches to faculty-student consensual relationship policies. For a discussion of the public-private dichotomy, see *supra* note 14 and accompanying text. *See generally* Secunda, *supra* note 16 (proposing sliding scale approach for faculty-student consensual relationships in higher education).

strictly prohibited.[203] As an initial matter, therefore, this approach is consistent with heightened review in the unconstitutional conditions context, which requires a constitutional balancing of interests.[204] In other words, a public university may not just tread heedlessly on an individual's rights to privacy and intimate association, but must engage in a careful weighing of the equities involved, which change from case to case and from year to year, before intruding into the private lives of its employees.[205]

In addressing these harms to others, the sliding scale approach establishes certain presumptions based on whether the professor has current academic responsibility for the student.[206] These presumptions assist in constraining the discretion of the courts when they apply this constitutional balancing test.[207] The sliding scale approach's use of these presumptions in its treatment of supervisory and nonsupervisory relationships is considered in turn below.

A. *The Presumption Against Supervisory Faculty-Student Relationships*

For obvious reasons, supervisory relationships between faculty and students can easily cause substantial harm to a public university's reputational and financial concerns, while at the same time undermine the credibility of the academic process from the standpoint of third party students or faculty members.[208] Consequently, in *most* cases, the university would prevail and could prohibit (and/or sanction) such supervisory relationships by showing that its substantial interests in enacting a consensual relationship policy outweigh the rights to intimate association and privacy that the professor enjoys.[209] Indeed, the strength of the interests on the

203. *See* Secunda, *supra* note 16 at 81 ("[T]he sliding scale approach is consistent with the idea that there can be no bright line rules in applying the nexus principle.").

204. For a discussion of heightened review and the unconstitutional conditions doctrine, see *supra* notes 90–100, 170–89 and accompanying text.

205. Professor Eskridge has argued that in this regard, the Millian approach is well suited for taking into account not only various third party harms, but also the fact that the identity and nature of these harms may change over time. *See* Eskridge, *supra* note 5, at 1101 (noting that libertarian approach contains dynamic component, in which existence of third-party harms often depends critically on changing social understandings of world).

206. *See* Secunda, *supra* note 16, at 81–84 (explaining sliding scale approach).

207. *See* Paul M. Secunda, *Politics Not as Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 FLA. ST. U. L. REV. 51, 99 (2004) (observing that presumptions do not totally eliminate decision maker discretion, but may nevertheless structure and constrain it).

208. For a discussion of the effects of supervisory relationships, see *supra* note 109 and accompanying text.

209. There are numerous reasons why such supervisory relationships are presumptively prohibited, all grounded in the fact that it is difficult for such relationships to truly exist in a manner that does not harm the interests of others. *See* Secunda, *supra* note 16, at 81 (justifying presumption against supervisory faculty-student relationships). For instance, because the student will be interacting with the professor in class or within some other institutional context, there will nor-

faculty member's side of the legal scale is diminished based on the common retort that in most cases such relationships may continue once the semester has ended and, therefore, the supervisory aspects of the relationship have been terminated.[210] Such interests are also likely diminished in the face of the increased deference given to academic decision-making by recent decisions of the Supreme Court.[211]

Only if the professor in a supervisory relationship can carry his or her heavy burden of showing that the faculty member's interests in pursuing the relationship outweigh the state's interests in preventing such relationships may the relationship be permitted.[212] What this most likely means in practice is that the faculty member must establish that there does not exist more than a *de minimis* detrimental impact on the college or university community for the individual interests to outweigh the state interests.[213] This potential outcome is consistent with both the balancing

---

mally be an evident conflict of interest between the professor's interests as educator versus his or her interests as lover. *See id.* at 82 (citing William C. Heffernan, *Privacy Rights*, 29 SUFFOLK U. L. REV. 737, 806 (1995)) (same). Moreover, perceived bias will normally infect the atmosphere and harm the academic integrity of the institution. *See id.* (citing Mack, *supra* note 104, at 82) (same). Perhaps most importantly, from the universities' point of view, such consensual supervisory relationships may lead a spurned lover to file a vindictive sexual harassment charge and cause the university to suffer through a high profile lawsuit, which, regardless of the outcome of the lawsuit, will cause diminishment of funds from the university's coffers. *See id.* (same).

210. *See id.* at 64 (identifying criticism of opponents to conflict of interest approach).

211. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."). The Court in *Grutter* upheld the use of affirmative action in the law school context. *See id.* (deferring to school's judgment that diversity is "essential to its educational mission"). I have argued elsewhere that I believe such enforcement of a faculty-student consensual relationship policy is primarily a disciplinary decision not entitled to deference. For a discussion of this disciplinary aspect, see *supra* note 162 and accompanying text. Nevertheless, it is possible that a court in this context will either diminish the individual's interests or inflate the state's interests as a result of the public educational context. *See also* Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 86 (1978) ("The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal.").

212. *See* Secunda, *supra* note 16, at 82 (establishing burdens of sliding scale approach).

213. *See id.* at 83 (giving examples where burden might be overcome). Of course, it may be pointed out that the sliding scale approach is attractive in theory, but leads to professors inevitably hoisting themselves on their own petards. The argument is that in order to show that the substantial interests surrounding the supervisory relationship with a student outweigh the university's and other third parties' relevant interests, the professor will have to adduce evidence that will be violative of the very same privacy the rule is seeking to protect in the first place. In response, I do not foresee professors meeting their burdens in these cases by testifying themselves, or having others testify, about the intimacies of their relations; rather, I envision them relying upon certain less invasive proxies to show the seri-

approach to substantive due process described above and the doctrine of unconstitutional conditions as it contemplates limited circumstances when the constitutional rights of the faculty member will outweigh the interests of the university and other relevant third parties.[214] Although these instances may be few and far between,[215] an appreciation of the importance of these constitutional rights requires no less.[216] The constitutional door to these personal relationships must remain open, even if just slightly, to satisfy the Millian conception of individual autonomy advanced by the *Lawrence* Court.[217]

Although potential criticisms of the sliding scale approach from a policy standpoint have been discussed elsewhere,[218] there no doubt will be some additional criticisms from a constitutional point of view. Critics might well argue that, by allowing an open-ended balancing approach in these types of cases, the certainty encouraged by the normal tiered approach will be destroyed and, eventually, lead to judicial activism and perhaps even a weakening of individual rights.[219] Be that as it may, the rules-based approach supported by the traditional tiered judicial standards of review has its own disadvantages, including the diminution of substantial,

---

ousness of their relationship and the lack of concern the university and others should consequently have in the continuation of that relationship. For instance, two thirty-something individuals, one professor and one student, engaged to be married at the end of the semester does not present the same issues and problems as a fifty year old professor and an eighteen year old student engaging in a casual sexual fling.

214. For an analysis of this balancing approach and the unconstitutional conditions doctrine, see *supra* notes 90–100, 170–89 and accompanying text.

215. *See* Secunda, *supra* note 16, at 82–83 (discussing situation where professor in supervisory role may overcome interests of university).

216. *See id.* at 83 (recognizing scarcity of permissible relationships in this context).

> Although the instances of when such supervisory relationships are permissible may not be many, and most . . . should be prohibited, I am nevertheless unwilling to countenance an approach to faculty-student consensual relationships that completely ignores the very real privacy and associational interests, constitutional and otherwise, that exist in this context.

Id.

217. This slightly ajar constitutional door is necessary because there may be instances when the potential for harm is minimal and consent of the student is not at issue. *See* Mack, *supra* note 104, at 92 (basing her conclusion on potential for harm to students).

218. *See* Secunda, *supra* note 16, at 82–84 (anticipating criticism that countervailing presumptions established by sliding scale approach could never be overcome).

219. *See* Carpenter, *supra* note 4, at 1141 (arguing that libertarian reading of *Lawrence* actually weakens individual rights because judges fearful of activist label will permit empirical claims of third-party harm to often trump liberty claims); *see also* Sunstein, *supra* note 12, at 78 (noting that general movement in direction of balancing would be nothing to celebrate because of, *inter alia*, loss of ability of individuals to plan their conduct going forward).

and in some cases, decisive privacy and intimate association rights.[220] In fact, it is this author's belief that judges commonly use the tiered approach of judicial review to hide and validate their normative preferences in deciding difficult cases.[221]

It is my preference that these balancing exercises take place in a forthright, analytical manner for all to see and that judicial discretion is meaningfully constrained by the presumptions in the sliding scale approach.[222] The presumptions employed under the sliding scale approach will substantially prevent the excessive risk of inconsistent and politically motivated judicial determinations.[223] In short, the balancing of relevant interests is the only satisfactory manner in which to proceed in this context.

B. *The Presumption in Favor of Nonsupervisory Faculty-Student Relationships*

Consideration of how supervisory relationships between faculty and students should be addressed by consensual relationship policies is only half the analysis. Current conflict of interest consensual relationship policies are also substantially underinclusive in the manner in which they deal with nonsupervisory relationships between faculty and students (for instance, where an undergraduate professor dates a law student).[224] In most conflict of interest policies, such relationships are merely discouraged, or even worse, not considered at all.[225] Needless to say, such relationships can cause the same harm to faculty members and students, as well as to

220. *See generally* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–713 (1976) (comparing open-ended standards and mandatory rules).

221. *See generally* Goldberg, *supra* note 75 (proposing single standard of review in equal protection jurisprudence).

222. It should be noted that the sliding scale approach does not adopt the classically liberal approach of Professor Gary Elliot in arguing for what amounts to basically a laissez-faire approach to supervisory consensual relationships. *See* Gary E. Elliott, *Consensual Relationships and the Constitution: A Case of Liberty Denied*, 6 MICH. J. GENDER & L. 47, 75–76 (1999) ("The sexual lives of consenting adults absent a violation of law, are not the business of the academy."). Rather, it takes seriously the rights of both the faculty members and other interested third parties and attempts to weigh the equities on a case-by-case basis and in a just manner.

223. Of course, a sliding scale approach may also lead to the unsettling of *ex ante* expectations for a professor contemplating a relationship with a student, as they will not know how to structure their behavior based on a well-settled, bright-line rule. Thus, this rule may deter consensual conduct as much as some of the present rules. Nevertheless, the sliding scale approach sets forth for the faculty member the considerations that will most likely be taken into account if the consensual relationship should come under review and, therefore, provides some direction to the professor, while also respecting the professor's rights to privacy and intimate association. (I would like to thank Professor Eugene Kontorovich of the George Mason Law School for exploring this issue with me in depth).

224. *See* Secunda, *supra* note 16, at 80 (asserting that some nonsupervisory relationships may be impermissible).

225. For a discussion of nonsupervisory policies, see *supra* notes 116–17 and accompanying text.

other relevant third parties and, therefore, such policies do not provide the needed flexibility to deal with harmful nonsupervisory relationships.[226]

On the other hand, the sliding scale approach counsels that if there is no current evaluative or supervisory relationship between the professor and student, such a consensual relationship presumptively does not impact negatively the college or university and thus should be permitted.[227] Again, the important point here is that the interests of the university, other faculty members and students are not ignored, but in appropriate circumstances may be weighed against the faculty member's rights to privacy and intimate association established by *Lawrence*.[228] Accordingly, the burden should be on the public university to establish that a detrimental impact exists that requires a regulatory response.[229] If the nonsupervisory relationship has a discernible and detrimental impact on the college or university environment, then the professor should be subject to discipline or be required to cease the relationship, as he or she has just as much interfered with the learning atmosphere as the professor who has engaged in a supervisory consensual relationship.[230]

Thus, the sliding scale approach to both supervisory and nonsupervisory consensual relationships in the public university context does not only make good policy sense, but also is constitutionally sound. Such an approach respects the overlapping, and sometimes contradictory, interests of the faculty member, student-lover, university and other third parties, while simultaneously providing a workable framework that permits the balancing of the individual and state interests involved. In providing decision makers with such flexibility, public universities adopting the sliding scale approach will be acting consistently with the *Lawrence* Court's constitutional mandate—giving adequate respect to the privacy and intimate association interests that inhere in these consensual relationship situations—

226. *See* Secunda, *supra* note 16, at 84 (providing that, where nonsupervisory relationship has detrimental impact on school, sliding scale approach allows disciplinary action).

227. *See* Young, *supra* note 102, at 288 ("Where the professor is not responsible for evaluating the student . . . the 'coercion' argument becomes quite weak.").

228. Such a weighing of interests could take place in a non-invasive manner as described above. For a discussion of this process, see *supra* note 213 and accompanying text.

229. *See* Secunda, *supra* note 16, at 83–84 (allocating burden to university). In rebutting the presumption of permissibility, the university will have to garner evidence to support its case. Nevertheless, I do not foresee the university being able to engage in discovery concerning private, intimate matters, as such information should be protected from disclosure based on the right to privacy and intimate association recognized in *Lawrence*. Like the professor in the supervisory case, the university in nonsupervisory cases will have to mount their challenge through circumstantial evidence as described above. For an example, see *supra* note 213 and accompanying text.

230. *See* Secunda, *supra* note 16, at 84 (providing that university may overcome its burden in nonsupervisory relationships).

while at the same time protecting against substantial disruptions on campus.[231]

VI. CONCLUSION

The *Lawrence* decision gives constitutional validation to ideas that I have elsewhere attempted to encapsulate while promoting the sliding scale approach to faculty-student consensual relationship policies. By redefining the relationship between substantive due process and equal protection, by invoking a heightened level of rational basis review in the substantive due process context and by adopting a constitutional balancing approach to weigh the relevant state and individual interests, *Lawrence* provides a quintessential Millian moment. Conceptions of individual sovereignty once again are taken seriously and governmental action that too eagerly and heedlessly intrudes into the private lives of individuals is struck down. The impact of this moment in Supreme Court history appears to be far-reaching and monumental, as has been demonstrated by this article's consideration of *Lawrence*'s impact on the doctrine of unconstitutional conditions and the public university faculty-student consensual relationship policy context. The true influence of *Lawrence*, however, will not be known for many years to come, and not decisively so until the Supreme Court has the opportunity to apply its *Lawrence* precedent to a case involving unconstitutional conditions in the public employment context.

---

231. The sliding scale approach already benefits from being derived from the well-established nexus principle of labor arbitration law. *See id.* at 66–79 (discussing development of labor arbitration nexus test and its application to university setting). Now, after *Lawrence*, university administrators and reviewing courts will be able to consult an ever-increasing body of substantive due process law elaborating on *Lawrence*, which will further structure and define the contours of policies that seek to regulate these faculty-student consensual relationships.